

THE
Grounds and Rudiments
OF
LAW and EQUITY,
Alphabetically Digested:

CONTAINING
A COLLECTION of RULES or MAXIMS, with the
Doctrine upon them, illustrated by various CASES extracted
from the Books and Records, to evince that these *Principles*
have been the Foundation upon which the Judges and Sages
of the Law have built their *solemn* Resolutions and Determin-
ations.

THE WHOLE
Designed to reduce the Knowledge of the LAWS of ENGLAND to a
more regular Science, and to form them into a proper *Digest*, for the
Service of the PROFESSORS and STUDENTS.

With Three TABLES.

First, Of the Rudiments and Grounds.

Second, Of the New Cases.

Third, Of Principal Matters.

By a GENTLEMAN of the *Middle Temple*.

In the SAVOY:

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P R V E F A U G E

Rec. May 29, 1896.

T H E
P R E F A C E.

THE following Sheets are intended to demonstrate and explain the Reasons and Principal Grounds of the Law of *England*, and by giving a general View of the whole Body, properly to prepare the Student for a more particular Observation of its several Parts; *Ab universalibus ad singularia procedendum est*. A Work of this Kind has long been wanted as a necessary Introduction to the Study of the Law; for though Mr. *Wingate* and Mr. *Phillips* have treated of the Maxims of the Law, they are by no Means, at this Time, fit to be put into the Hands of a young Student; the First, tho' very Prolix, containing but a few Principles, and those explained by many obsolete and intricate Cases; and the other being too superficial to be of any real Use. On the contrary, this Work comprehends every Principle or Maxim

The P R E F A C E.

Maxim of Law that is to be found in any of our Books, either of Law or Equity, and has fully explained them in a comprehensive Stile, by the most Modern Instances that the Nature of each particular Maxim would admit, and by a *great Number of Cases never before printed.*

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I N T R O

INTRODUCTION.

Of Law.

In general.

NATURE hath taught all people to chuse governors, judges and leaders: and that they might not be at the despotic will of such rulers, all people have enacted laws as a guide both to the governors and governed: and that even in countries where revelation never came, or *Aristotle's* politics were ever heard of; and where neither *Lycurgus*, *Solon*, or other eminent or prudent lawgivers lived, having no other foundation or origin than meer necessity: and therefore law is justly defined to be the rule of government and obedience.

Its definition and origin.

CICERO defineth it to be a certain rule proceeding from the will of God, persuading that which is just and good, and prohibiting that which is evil. The learned *Selden* says, all laws were originally from nature, and are equally antient; and nature being the same in all, all laws were originally the same. *Dugdale* saith, *Lex est sanctio sancta, jubens honesta & prohibens contraria*. Sir *Walter Raleigh* thus delivers himself on this subject, *Lex est vitæ regula, præcipiens quæ sunt sequenda et quæ fugienda*.

The sorts.

ST. Germain, in his *Doctor and Student*, divides laws into these three, 1. The law of nature; 2. The law of God, and 3. The law of man. Whilst Mr. Serjeant *Finch* determines them to two, 1. Native; 2. Positive. The first being the law of nature, the latter comprehending the other two, namely, the law of God revealed in the holy scriptures, and the law of man.

Native.

THE laws of nature or reason are such as are implanted in us, being written in our hearts, distinguishing good and evil; and these are perpetual and unchangeable.

God's law.

THE law of God is a certain law given by revelation to reasonable creatures; (as to the *Jews* by means of their prophet *Moses*, or to us *Christians*, by a greater than *Moses*, the lord of life, *Jesus Christ*) shewing the will of God, for attaining eternal happiness.

Human law.

THE law of man is a law made by human authority, for the well governing and ordering of any people, and is made by such as are lawfully authorised thereunto, and must be suited to the tempers, dispositions and other circumstances of the people; and can justly propose no other end than to make the people good, and to bring them to virtue; which being done, all the purposes of government are answered. And this law of man must be built upon the basis of the former laws, else it is not properly a law, but an imposition and abuse, and is altogether useless and vain, and void of all force.

Human law grounded on the law of God.

ALL human laws to bind, must be grounded on the law of God, whether we understand it of the moral law, written on the tables of our hearts, or of that law of God, which he hath in his great mercy and love revealed unto mankind; which is what we more immediately mean here; as such law is the direct and proper object of politic government, and is the just bounds and limits of all human power. And this law is always like itself, and of equal necessity; it is the image of that righteousness and holiness in which God created our first parents, and the model of that perfection unto which we shall attain in the kingdom of heaven. And every human law must needs be so far void, as it is either contrary to, or deviates from this eternal unerring rule; whilst a law thus grounded, being consonant to reason and revelation, as both are one and the same eternal law, differently imparted to men, *viz.* the one by the light of reason, the other by revelation, is of force and binding on men.

Human law grounded on the law of reason.

AND as all human laws must be founded on the law of God, so they must also be consonant to the law of reason; for *Nil quod est contra rationem est licitum*; for reason is the life of the law, as law without it is but a dead letter: when law is not founded on reason, it ceaseth to be law; as where a law, though generally good, yet by the circumstances of a particular case is severe, for the righteousness of the law can do no wrong, and rather than a wrong should be done under colour or pretence of law, equity shall interpose, (which equity is taken and admitted as part of our common or principal laws of this realm) as it is in *Plowden*, the words of the law are not the law, but the internal sense: all laws have a body and soul, the letter is that body, and the true meaning the soul; *quia ratio legis est ani-*

ma legis; and the profit of the law is in its meaning rather than in the letter, and therefore it is that the sense of the law sometimes shall not be carried so far as the letter would go, whilst at other times it shall be extended beyond the letter; and it is equity which thus amplifies or diminishes the letter of the law.

Equity, what it is, and its use.

ARISTOTLE, the philosopher, defineth it thus, *Aequitas est correctio legis generaliter latae, qua parte deficit*, and according to *Perionius*, *Aequitas est correctio quaedam legi adhibita, quia ab ea abest aliquid propter generalem sine exceptione comprehensionem*; both which definitions agree and come to the same thing, and which correction of general words is much used in the laws of *England*, as may be seen by many cases in the books, and particularly in *Eiston's case* in *Plow.* 462. and thus it is that *Hooker* saith, that the general rules of law are to be practised according to their right meaning; for according to strictness of law, saith he justly, in contracts and dealings which daily pass between man and man, things, by strictness of law might be done, which equity and all honest meaning forbiddeth; and yet the law is not unjust or defective; neither is equity against it, but above it, binding mens consciences to things which the law cannot reach unto; as that is a certain rule, and so unable to consider circumstances, this supplying the silence of the law, and taking in those circumstances, and judging according to conscience.

The binding force of human laws.

AND of a Law, thus grounded and moderated, a learned author well said, *est omnium divinarum et humanarum rerum regina, et imperium legis imperium dei est*; for as it is said in *Doctor and Student*, whatsoever is righteous in the law of man is righteous in the law of God, and laws of man not contrary to the law of God and reason, must be observed in the law of the soul: and he who despiseth them despiseth God; and he who resisteth them resisteth God; for the powers that are, are of God. See rule *Aequitas sequitur legem*.

The common law, its grounds.

THE common law of *England* is grounded, 1. On the law of reason. 2. On the law of God. 3. General customs. 4. Maxims. 5. Particular customs; and 6. Statutes.

On the law of reason.

THE first of these, namely, the law of reason, is the power of the soul, discerning between good and evil, and this is observed in this, as in all other realms, of necessity; nay the law itself is nothing but reason; but then we must understand this with my Lord *Coke*, of an artificial perfection of reason, gotten by long study, observation and experience, for *nemo nascitur artifex*, and not of the reason of every common, uninformed mind; for *neminem oportet esse sapientiores legibus*; much less may men set
up

up for adepts in law, and cavil with her principles, who are unlearned therein.

On the law of God.

THE second ground of the law of *England*, is the law of God, revealed in holy writ, and this is the head and master-piece of all the rest; whereof as St. *Austin* the father said truly, *omnium legum est inanis censura, nisi divinae legis imaginem gerat.*

On general customs.

THE third foundation whereon the *English* laws are raised are certain general customs, of old time used throughout all the realm, and are such as have been accepted and approved by both kings and people; and because these are neither against the law of God nor the law of reason; but have been always or immemorially taken to be good and necessary for our commonwealth; they have from such acceptance and use obtained the force and authority of law; and are what is properly called the common law, to the preservation and observance whereof our sovereigns swear at their coronations. And what is and what is not *common law*, is only determinable by the king's judges or parliament, and not by a jury or the country, neither by the king himself; for as my lord *Coke* told king *James*, that though he was the head of the law, yet his majesty was not to be presumed confusant of the niceties of law, neither could of himself meerly, and without the means of his judges in his courts of *Westminster-hall*, or of his lords in parliament, determine upon the properties, much less upon the lives of his subjects; nay the king by his warrant or royal command may not, though his judges and magistrates may, for good cause, imprison the persons of his majesty's subjects; for that if wrong were done to such subjects thereby, they could have no remedy against his majesty, as they might against a fellow subject. *Rex sub nullo nisi tantum sub deo et lege*, says *Bracton*, and that the king can do no wrong, is a maxim known to the meanest; and therefore if wrong is done, it is not the king that did it, but his majesty was deceived in such act, and it was not properly his. And the same reason, as my lord *Hobart* saith justly, that supplies the king's ignorance in matters of fact, will also excuse his want of knowledge even of the law in the niceties of it; for though we agree with the reverend and learned *Fortescue* and the lord *Coke*, that it be the office of kings and princes to make themselves acquainted with the general rules and notions of those laws by which they are to govern, yet it cannot be expected, because it is impossible they should study it so closely as to know all the niceties and turns of it, as the lord *Coke* himself allows; for they have greater and much more important concerns; for he, saith my lord *Hobart*, speaking of the king, studies a greater art, *sc. arcana regni*, the art of government, which is *ars artium*, and contains all other arts, as the commonwealth includes, and comprehends in it all private societies. The end of kings, as of all other governors, in their very constitution, is the well governing of the people, and their strength is in the hearts of their subjects; protection and allegiance are reciprocal ties.

On principles or maxims.

THE fourth ground of the law of *England* stands on divers principles or maxims, which have been always, or time out of mind, taken for law in this realm, and these are so high in authority, as they may not be questioned, but all men are bound to allow them without dispute, as will fully appear hereafter.

On particular customs.

THE fifth ground of the laws of *England* stands on divers particular customs used in divers counties, towns, cities and lordships in this realm: and these customs, because they are not against the law of reason, nor the law of God, though they are against the general customs or maxims above mentioned, yet are allowed and stand for law, in those particular places where they are used: but then such particular customs must be immemorial and reasonable: and if any question ariseth whether there be such custom? it shall receive its decision from the jury or twelve men, and not from the judges; except the same be of record in the same court. Yet of the fitness or reasonableness of any particular custom the king's justices in his courts of record in *Westminster-hall*, are, as I conceive, the only judges under parliament.

On acts of parliament.

ACTS of parliament are the sixth ground of the common law: and these are laws, as is known to all, made by authority of parliament, that is to say, king, lords and commons, and are made to supply the defects of the law, and to punish wicked and reward good men. And these six are the only grounds that *St. German* remembers to have met with of the laws of *England*. But as these, as all the fixt rules of government, have an unavoidable mixture of severity in particular cases, equity or good conscience is, in many of those cases, allowed to interpose; and therefore I submit it, it may not be improper to see what that is, as considered by the lawyers.

Equity, what.

EQUITY, of which God is the efficient cause, is a right wisdom which considereth all the circumstances of the matter, and is tempered with the sweetness of mercy. And as *summum jus summa est injuria*, as it cannot consider circumstances; and as this takes in all the circumstances of the case, and judges upon the whole matter, according to good conscience; this shews both the use and excellency of equity above any prescribed law. The nature whereof is, as *Bracton*, lib. 1. cap. 3. saith, to amplify, enlarge, and add to the letter of the law (as is *Finch's law*, 6. b.) according to the equitable circumstances of the case. And equity is so extensive and various, that every particular case in equity may be truly said to stand upon its own

particular circumstances; and therefore, under favour, I apprehend precedents not of that great use in equity as some would contend; but that equity thereby may possibly be made too much a science for good conscience.

Again equity is that, which is commonly called equal, just and good, and is a mitigation or moderation of the common law, in some circumstances either of the matter, person or time; and often it dispenseth with the law itself. It ministreth a fit proportion suitable to circumstances, and in a word is the correction or amendment of a good law, which by reason of its generality is defective in some particulars.

And again this is in opposition to, or rather for remedy against, the *summum jus*, which is most exact and precise law, and sometimes repugnant to equity, which *summum jus* the civilians say is so full of rigour, as to be almost unjust, and that law in the highest degree is wrong in the highest degree. Yet with deference I apprehend, this ought not to be generally imputed to our laws; as they are most certainly the best set of human laws extant, having been, as my Lord Coke most wisely observes, by so many successions of ages fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this realm, as to be the very perfection of reason; yet as these must be confessed to be general, and not capable of variation according to circumstances, for if they were, they would be no longer a certain rule for the government of the people in general; therefore it is, that the wisdom of our constitution hath provided that there should be one superintendant power to give relief in private cases, where either for particular reasons and circumstances the public laws ought not to take place, or where the same are silent, or have not appointed remedy adequate to the case; for *aequum et bonum est lex legum*, and this authority it is which is called equity; as it meddleth only with matters of conscience.

Of what equity holdeth cognizance in its absolute power.

THE matters, of which equity holdeth cognizance in its absolute power, are such as are not remediable at law, and of them the sorts may be said to be as infinite almost, as the different affairs conversant in life: many of which may be seen in *Doct. & Stud.* my lord *Elsmere's* observations, and scattered through the other books.

Where no relief either at law or in equity.

YET there are many other cases in which there is no relief to be had either at law, or in equity itself, but the same is left to the conscience of the party, as a greater inconvenience would from thence follow to the people in general; to avoid which the law must of necessity, and as the lesser of two evils, suffer a mischief to one or a few men, rather than a general inconvenience: yet in such case the party is bound in conscience to redress it, if he will avoid offending against conscience, as much as if he really were compellable thereto by either law or equity; as if a man wage his law in an action of debt brought against him upon a just debt, here the

the plaintiff is deprived of all means of recovery, either at law or in equity, and yet the defendant is bound in conscience to pay him. Also if the grand jury, in an attain, affirm a false verdict, given by the petit jury, there is no remedy but the conscience of the party. Also where there cannot be sufficient proof, ~~there can be no remedy in chancery or equity, no more than at the common law.~~ So in cases where a man is not bound to discover either at law or in equity, for that such discovery would subject him either to corporal punishment or disgrace, if it turned out against him; therefore the law, rather than it will compel him to discover to such manifest hurt of himself, or force him upon wilful and corrupt perjury, refers the matter for redress to his own conscience: and therefore the rule, *nullus recedat a cancellaria sine remedio*, doth not extend to these and the like cases against the law of conscience divine, but the offender standeth at the judgment of God only.

Of Maxims.

In general.

MAXIMS, rules, common grounds, *postulata*, or axioms, are the same. *Co. Lit. 11. a.*

A maxim is a proposition to be of all men confessed and granted without proof, argument or discourse. *Contra negantem principia non est disputandum. Co. Lit. 67. a.*

A maxim, *i. e.* a sure foundation, or ground of art, and a conclusion of reason, is so called, *quia maxima est ejus dignitas, et certissima autoritas, atque quod maxime omnibus probetur*; so sure and uncontroulable as that it ought not to be questioned. *Co. Lit. 10. b. 11. a.*

Maxims are one of the grounds of the law of England. *Doct. & Stud. lib. 1. cap. 8.*

One may be excepted from the rigour of a maxim of the law, by another maxim of the law. *Doct. & Stud. lib. 1. cap. 17.*

Maxims may be taken for common law. *Doct. & Stud. lib. 1. cap. 8. lib. 2. cap. 15.*

How to be known.

THE maxims of the law may be known, partly by the law of reason, by the books, by records, and by several statutes, wherein many of them are recited. *Doct. & Stud. lib. 1. cap. 9.*

Their antiquity, authority, excellence, and how favoured.

A Maxim is called a principle in law, *sive principium, quod est quasi primum caput*, from which many cases have their original or beginning, which is so strong that it suffereth no contradiction; and therefore it is said in our books, that antient principles of the law ought not to be disputed. *Contra negantem principia non est disputandum. Co. Lit. 343. a.*

No reason need be assigned why they were first received for maxims; for it sufficeth that they are not against the law of reason, nor the law of God, and that they have been always taken for law. And such maxims are not only holden for law, but also other cases like unto them, and all things that necessarily follow upon the same are to be reduced unto the like law, &c. *Doct. & Stud. lib. 1. cap. 8. lib. 2. cap. 15.*

Maxims are of the same weight in law as statutes, and the general customs of the realm are their strength and warrant. *Doct. & Stud. lib. 1. cap. 8.*

General rules are good and necessary to all people. *Doct. & Stud. lib. 1. cap. 12.*

Rules and maxims of law must be observed; and therefore though the rule be, *quod voluntas donatoris secundum formam in charta doni sui manifeste expressam de cætero observetur*, yet that will and intent must agree with the rules of law. *Co. Litt. 20. b.*

None may dispute the antient principles of the law. *Co. Litt. 11. a.*

There is no disputing of things manifestly true or false; for all argumentation is *a notioribus*. *Hob. 163.*

Maxims have been always taken for laws in this realm, so that it is not lawful for any that is learned to deny them; for every one of them is sufficient authority to itself. *Doct. & Stud. lib. 1. c. 8.*

Where the words of a statute create an estate of inheritance against a general rule of law, the law requireth that they be legally pursued. *Co. Litt. 21. b.*

Every proof ought to be by the highest, and most supreme cause, and nothing can be higher and more supreme, than the principles of law; and therefore they are to be allowed; for the very reason that they want not to be proved. *3 Co. 40. a.*

Who to determine.

WHAT is a Maxim, and what not, shall always be determined by the judges, and not by 12 men. *Doct. & Stud. lib. 1. cap. 8.*

May be changed.

Sometimes the old maxims of the law are changed by statute, as there was sometime a maxim and law of *England*, that no man should have a writ of right but by special suit to the king, and for a fine to be made in chancery for it; which is now changed by *Magna Charta*, *cap. 16.* where it is *nulli negabimus, nulli vendemus rectum vel justitiam*, by which words *nulli negabimus*; a man shall have a writ of right of course in chancery without suing to the king for it; and by the words *nulli vendemus*, he shall have it without fine. *Doct. & Stud. lib. 1. cap. 8.*

PRINCIPLES

OF

Law and Equity.

1. *Accessorium non ducit sed sequitur principale.*

1. **A** Servant procures one to slay his master; this is not petit treason in the servant; being but felony in the principal. 40 *Aff. pl.* 25.
2. A parson grants an annuity with a *nomine poenae*, his successor shall be charged with the penalty due in the life of the predecessor, and not his executor. 7 *H. 6.* 19. *b.*
3. The profits of the office of a filacer shall not be put in execution upon a recognizance, statute, or the like; because the office itself, being an office of trust, cannot. *Dy. 7. b.*
4. Tithes are not payable of oaks usually top'd and lop'd; for the branches partake of the nature of the principal, for which no tithes are payable. *Fi. Law Engl.* 23, 24.
5. See *Cro. Eliz.* 477. *Co. Litt.* 152. *a.*

2. *Actori incumbit onus probandi.*

1. **H**E, who intends to avoid a deed of bargain and sale by reason of non-inrolment within six months, must make good proof thereof. 4 *Co.* 70, 71. *b.*
2. When you will recover any thing from me, it is not enough for you to destroy my right, but you must prove yours better than mine; for *melior & tutior est conditio possidentis*. *Hob.* 103.

3. *Actus dei nemini facit injuriam.*

1. **O**NE is taken in execution and dies, the plaintiff may well resort to a new execution; for the death of the defendant, which is the act of God, shall not turn to the prejudice of the plaintiff. 5 *Co.* 86. *b.* 87. *a. b.* *Cro. Eliz.* 555. *S. C.* *Stat. 21 Jac. 1. c. 24.*
2. See *Cro. Eliz.* 478. *Hob.* 40, 52, &c. 59. *Cro. Jac.* 694. 4 *Co.* 66. *a.* See next rule, case 1, 2.
3. See rule, *Equity to relieve where the matter lieth in compensation.*

4. *Actus legis nulli facit injuriam.*

1. **I**F the son be lord, and the father tenant by certain rent, which is in arrear, the tenant dies, and the tenancy descends to the son, the rent is extinguished by act in law, the tenure being all in the realty. So where the case was, that the father granted a rent-charge out of certain lands to his son in fee, the father dies, the rent is in arrear, and the land descends to the son, whereby the rent was extinguished by act in law; the son brought debt against the executor of his father, for the arrearages incurred living the father: adjudged the action lay not; but for the arrears of an annuity *aliter*. 4 Co. 49. *a. for there the person only is bound, and it is not issuing out of the land.*

2. Recovery in debt on a bond against two, one was taken in execution, and suffered (wilfully by the gaoler) to escape; this shall not prejudice the plaintiff of his execution against the other: and yet the release or discharge of one by the plaintiff should discharge both; but at another day Popham was of a contrary opinion, and Fenner doubted; because the voluntary escape had given the plaintiff remedy against the sheriff by action for all the debt. And the case was after adjudged with Popham. Mo. 459. *The reason why the discharge of the one shall enure to both, is, because otherwise the plaintiff might avoid his own discharge, by seeking his full remedy against the other defendant; which would be to such defendant's wrong, who was intitled to contribution against his companion; and it was the plaintiff's own act to discharge one defendant, which act, according to another rule, ought to be construed most strongly against himself; and therefore to be extended to discharge both defendants. As to Fenner's doubt, it is clearly held by lord Hobart, fo. 60. that in such case the plaintiff hath his choice to take the other defendant, or to get satisfaction from the sheriff upon the escape; and sure it would be hard in the present case to drive the plaintiff to his remedy against a gaoler, &c. who may be worth nothing; and to this purpose I remember to have met with a case where the plaintiff was not put over to his remedy against the gaoler, &c. ideo quaere?*

3. Debt *sur judgment*, defendant pleaded he was taken *sur ca.* and committed to the marshal of this court, and had paid the money to him; on demurrer adjudged no plea: for the marshal is not to receive the debt, but only to detain the defendant in prison till he pay the plaintiff. But payment to the sheriff *sur fi. fa.* is a good plea; for he hath thereby an authority to levy the debt: but payment to the sheriff *sur ca' sa'* is perhaps no plea for the reason aforesaid. 2 Lev. 203.

4. See rules, *Nullum iniquum est in jure praesumendum. Executio juris non habet injuriam.*

5. *Actus legitimi non recipiunt modum.*

1. **T**HE acts of presentation, institution and induction, are all authorities given by law, and must be executed according to the form prescribed by law, and cannot be modified; for *actus legitimi non recipiunt modum*; for the law gives the church, not the patron and ordinary, who are but ceremonious ministers, and are appointed their manner and form, which they

they neither may exceed nor abridge. *Hob. 153. Co. Litt. 344. Hob. 149. 2 Jur. Eccl. 373, &c.*

2. So a man may assign a rent for dower, out of the dowable lands, without deed; but it must be for no less than for life. *Ibid.*

3. Nay, a jointure, which is but an imitation of dower, or a bastard dower, cannot be made for the life of another. *Ibid. 4 Co. 2. b. 3. a.*

4. An estate, which by force of the *Stat. 27 H. 8. c. 10.* shall be in lieu and bar of a woman's dower, ought by the limitation of it to take effect immediately after the death of the husband; and therefore no other estate, not expressed in the act, shall be taken, by the equity of the act, unless it hath the same commencement for the benefit of the wife as those expressed purport; and therefore if the husband make a feoffment in fee to the use of himself for life, and after to the use of *B.* for his life, and then to the wife for life for her jointure, this is not within the act, though *B.* die, living the husband. So if the husband make a feoffment in fee to *B.* for life, and then to the use of the wife for life, tho' *B.* dies, living the husband, yet this is not good as a jointure within the Statute; for as they were out of the act at first, and as it was not certain that the wife's estate should take place immediately on the death of the husband, no subsequent event could bring them within the act, for *quod ab initio non valet tractu temporis non convalescet.*

4 Co. 2. a. b. So if lands are conveyed to the use of a feme before marriage for part of her jointure, and after marriage further lands are conveyed to her use in satisfaction of all her dower, and then the husband dies, if the wife waive the lands conveyed to her after the marriage, she shall have those conveyed before marriage, and dower of the rest; for lands conveyed to her in part of her jointure, or in part of satisfaction of dower, are no bar (for the incertainty) for any part of her dower. *4 Co. 3. a.*

5. So if a debtor gives to his creditor a horse or other thing in satisfaction of part of his debt, it shall be a bar for no part, for the same reason of incertainty. *Ibid.*

6. In case of quarentine, the wife must not depart from the house of her husband upon his death, and return when she pleases for the rest of her days. *Hob. 153.*

7. If the king grants the office of *custos rotulorum*, or chief justice, to two, it is void. *Ibid. See 18 E. 4. 7.*

8. The chief justice cannot grant the offices of his gift as chief justice, for less time than for life. *Ibid.*

9. If the king grants the custody of the land of a lunatic, *absque compoto*, it is void. *Ibid.*

10. See rule, *Cessa regnare si non vis judicare.*

6. *Actus non facit reum nisi mens sit rea.*

1. **A**S to one *de non sane memorie*, the law is, that he shall not lose his life for felony or murder; because the punishments are too grievous: (*scilicet*) for felony, 1. A man shall lose his life; 2. In so odious a manner, *sc.*, by hanging; for he shall be hanged between heaven and earth as unworthy of either. 3. He loseth his blood, as to his ancestry; for he is deemed the son of the earth, without ancestor; and as to his posterity, for his blood is corrupted, and he hath neither heir nor posterity. 4. His lands. 5. His

goods.

goods. 6. And in such case the king shall have *annum, diem & vasum*, to the end his wife and children may be cast out, his house erased, his trees rooted up, his meadows plowed, and all that he hath for comfort, delight, or support, be cast down and destroyed for his having feloniously offended against the law; and all this was, *ut poena ad paucos, metus ad omnes perveniat*. 4 Co. 124.

2. 1st, The punishment of a madman, who is deprived of his reason and understanding, may not be compared to any other punishment. 2ly, No felony or murder may be committed without a felonious intent and purpose; *et ideo dicta est felonia, quia fieri debet felleo animo*; but *furiosus non intelligit quid agit, et animo et ratione caret, et non multum distat a brutis*, and therefore cannot have a felonious intent. 4 Co. 124. b.

3. In criminal causes, as felony, &c. the act and wrong of a madman shall not be imputed to him; for in those causes *actus non facit reum nisi mens sit rea*; and he is *amens*, i. e. *sine mente*, without his mind, or discretion; *et furiosus solo furore punitur*, a madman is only punished by his madness; and so it is of an infant till fourteen, which in the law is the age of discretion. Co. Lit. 247. Yet he, who hath by his own vice, as the drunkard, who is *voluntarius daemon*, deprived himself of his understanding, what hurt or ill soever he doth he shall be accountable for, for his drunkenness aggravates it. Co. Lit. 246. b. 247. a.

4. A *non compos mentis* cannot commit petit treason, as a wife to slay her husband, but they may in some cases commit high treason, as it is for such a one to slay, or even offer to slay the king; for the king *est caput et salus reipublicae, et a capite bona valetudo transit in omnes*; and therefore their persons are so sacred, that none ought to offer violence to them, but it is *crimen laesae majestatis, et pereat unus ne pereant omnes*. 4 Co. 124. b.

7. *Ad ea quae frequentius accidunt jura adaptantur.*

ABators, intruders, feoffees of disseisors, &c. are out of the stat. 37 H. 6. cap. 1. because the statute is penal, and extends only to a disseisin, which was the most common mischief. See Co. Lit. 238. a. b. 240. a. b. Doct. & Stud. lib. 1. cap. 8. cap. 17. Hob. 323. Co. Lit. Continual claim and discontinuance, &c.

8. *Admiralty not to hold plea of matters cognizable at law.*

General.

1. **T**HE admiralty is a jurisdiction derived from the crown of England, and it is of two kinds. 1. *Jurisdictio voluntaria*, which is the power of the lord high admiral, as the king's general at sea, over his fleet. 2. *Jurisdictio contentiosa*, which is the jurisdiction the judge of the admiralty hath *in foro contentioso*, and this is confined, by the laws of the realm, to things done upon the high sea only; but matters done on land, whether the same be here or beyond sea, though the execution of it be in some measure upon the high sea, and many more, belong not to the admiralty jurisdiction: and so the common and statute laws confine and limit their jurisdiction to matters maritime, and that only to such as are done on

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the high seas. And this court is not founded upon the authority of the civil law, but hath both its power and jurisdiction by the law and custom of the realm, in such matters as are proper for its cognizance. *Ha. Hist. Law*, 34, 35, 36. And the civil law is allowed to be the rule of their proceedings, only so far as it is not contradicted by the laws of the land, or by the maritime laws, which have in some particular points prevailed here in derogation of the civil law, as by stat. 28 H. 8. cap. 15. *Ha. Hist. Law* 34, 35, 36.

2. If any of these inferior courts abuse their authority, or exceed their delegation, &c. though the court of king's bench hath not power to hold plea of the matter libelled for; yet they may limit the jurisdiction, or grant prohibitions, or writs upon the statutes of provisions, according to the nature of the case. See *Godb.* 247.

3. The soil, upon which the sea flows and reflows between high water and low water mark, may be parcel of a manor; yet resolved when the sea flows, and hath *plenitudinem maris*, the admiral shall have jurisdiction of things done upon the water, between the high water and low water mark. 5 Co. 107. a.

4. Resolved, 1. That the court of admiralty hath no cognizance of things done beyond sea. See *Stat.* 13 R. 2. cap. 5. They are only to meddle with matters done on the sea, not with matters done within the realm. *Vide* 19 H. 6. 7. For things transitory done beyond the seas, are either triable in the king's court, or the party grieved may have his remedy before the justices where the fact was done beyond seas. 2. That the proceedings in the admiralty are according to the course of the civil law, and therefore not of record; and by consequence the court of admiralty cannot assess and fine in such case, as a court of record may do, &c. 12 Co. 104.

Particular cases.

5. *Per Hale* chief baron *et tot cur'*: Upon *Habeas corpus* to remove a prisoner in the admiralty, though the *Habeas corpus* be returnable the next term, the sheriff or gaoler must not in the mean time suffer the prisoner to go at large, and if he does he is liable to an escape; for the writ impowers the gaoler only to bring him directly to the court, and if he gives him any liberty in the mean time, it is at his peril. *Hard.* 476.

6. On application for a prohibition to the court of admiralty to stay a suit there by mariners against two of the part-owners for wages, upon a suggestion that the contract was made on land, the court denied it; for the court of admiralty has ever been allowed to proceed for mariners wages: and though the plaintiffs have an employment in the ship as purser, boatswain, or the like, yet they are mariners, as well as others, and may sue in the admiral's court for their wages: and that court having jurisdiction, are to proceed in their own way, though different from our law, as to the joining of all the plaintiffs or defendants; and if the proceedings be not according to their law, the remedy lieth there. *Note*; It was said by one of the admiralty, that though the suit be against some of the owners, the course there is not to charge them with the whole, but according to their proportionable parts; *aliter* of the master, he cannot sue in the admiralty; because he contracts on the credit of the owners; but the mate and others may; for they contract with the master. *Salk.* 33.

7. On prohibition prayed to the admiralty: *Morice* was captain of a private man of war, wherein *Berkley* had an interest; and *Morice* took a merchant ship beyond the line, and *Berkley* sued him in the admiralty for an account; *Morice* pleaded the statute of limitations, 21 Jac. the cause of action appearing on the face of the libel more than seven years standing before the suit commenced; and now *Morice* suggested, in order to gain a prohibition, that the court of the admiralty would not receive that plea: it was held that the plea ought to have been received; for that the statute was pleadable there, and the refusal was a good cause for a prohibition. The same, if they received it, and did not give sentence thereupon as the common law requires: but a prohibition lies not before refusal, because the matter is triable there; and as to *Morice's* absence, the court said that the absence of the defendant was not material; for the act provided for the absence of the plaintiff only; *et adjournat'*. Hard. 502.

8. Where a cause ariseth at sea it belongeth to the admiralty; but where at any port or land, it belongeth to the common law. *Hob.* 79, 213.

9. *Bourn* was imprisoned at *Dover* by the lord warden of the *Cinque ports*, because he took an anchor and cable as a wreck, in the liberty of the rape of *Hastings*, which the lord warden pretended to be within the *Cinque ports*, and to belong to him, having the jurisdiction of the admiralty there. *Bourn* was 23 weeks imprisoned there, whereupon an *Habeas corpus cum causa* was granted there; which the lord warden would not obey; wherefore now in open court, an *Alias habeas corpus* was prayed, with a penalty; his lordship pretending that this writ was not awardable to the *Cinque ports*, nor returnable by him, as the king's writ he pretended runs not there, &c. *Keeling*, the secondary in the crown, vouched a precedent 22 E. 1. in the exchequer, where process out of that court for the king's debt was awarded to one of the *Cinque ports*; and because they would not return the writ upon pretence of their privilege, that the king's writ did not run there, they were fined 100*l.* and 30 H. 6. that the king's writ in particular cases may be granted to the lord warden of the *Cinque ports*. And *Mountagu* chief justice said, the privilege of the *Cinque ports*, that the king's writ runs not there, is to be intended between party and party, but no such privilege can be against the king: *And this writ is a prerogative writ, which concerneth the king's justice to be administred to his subjects; for the king ought to have an account why any of his subjects are imprisoned; and it is agreeable to all persons and places; and no answer can satisfy it, but to return the cause, with paratum habeo corpus, &c.* and this writ hath been awarded out of this court to *Callis*, and all other places within the kingdom: and to dispute it is not to dispute the jurisdiction, but the power of the king and his court, which is not to be disputed: and of this opinion were all the judges. And *Doderidge* said, that he had often seen, that where an alderman, or any other officer, was displaced without cause, that a writ of restitution had been awarded hence to the *Cinque ports*, and that he remembered the case of one *Brierly* where it was so awarded; wherefore they all held, that an *Habeas corpus*, with a great penalty, should be awarded at another day. *Cro. Jac.* 543, 544. *Vide* 692. *Salk. Tit. Admiralty, and fo.* 548.

9. *Aequitas sequitur legem**General.*

1. **W**HERE conscience shall be ruled by law, is not only to be understood of the law of reason, and of the law of God, but also of the law of man, when not contrary to the law of God or the law of reason, but that it is superadded to them, for the better ordering the commonwealth: for such a law of man is always to be set as a rule in conscience, so that it is not lawful for a man to turn from it; for such a law of man hath not only the strength of man's law, but also of the law of reason and the law of God, whereof it is derived; for laws made of man, who hath received of God power to make laws, are made of God; and therefore conscience must be ordered by the law; and whether the law is to be forsaken for conscience or not? is not to be understood of the law of reason or the law of God; for these two laws may never be departed from, neither is it to be understood of the law of man, made in particular cases, and consonant to the law of reason and the law of God; nor is it to be understood of a law made by man, commanding or prohibiting any thing to be done that is against the law of reason or the law of God: therefore after them who are learned in the laws of *England*, the said question, where laws are to be left for conscience and where not, is to be understood in divers manners, and after divers rules: as, a man is bound to do to another, as he would be done unto, &c. *Doct. & Stud. lib. 1. cap. 19. See West's precedents.*

2. In many cases conscience shall be ruled after the laws; as, the eldest son shall have his father's land by conscience, as he shall in law. So in *Borough English* the youngest son shall enjoy. In gavelkind the sons shall inherit together: and no other reason can be given why it should be so in conscience, but because law is so. *Elf. Obs. 78. Doct. & Stud. lib. 1. cap. 16.*

Particular cases.

3. An *English* bill for relief against the defendant for rent, the defendant being assignee of an assignee of a wine-licence lease made by the plaintiff, rendering 41 l. *per annum*, and it appeared that the defendant was a purchaser of his interest in the lease for a valuable consideration, and had no notice of the rent reserved upon the original lease; and therefore the bill was dismissed, because it is a personal contract, which does not run with the licence; as in case of a lease of a fair, rendering rent, an action of debt does not lie against the assignee, and *aequitas sequitur legem* in this case, especially where the assignee is a purchaser for a valuable consideration without notice of the rent reserved. *Hard. 88.*

4. A man seised of lands in fee, hath issue a daughter who is her father's heir apparent, the daughter takes husband, and they have issue, the father dieth seised, and the husband, as soon as he heareth of the death of the father, goeth towards the land to take possession, and before he can get there his wife dieth, here the husband shall not, even in conscience, be tenant, *per le curtesy*, though he hath done every thing in his power to get possession; and that because he had not possession in deed; and yet he shall be tenant by the courtesy of a rent, though his wife die before the day of pay-

payment: so of an advowson, though she die before the avoidance. And in the first part of this case the husband cannot be holpen by conscience or in equity; for conscience must always be grounded upon some law, and it cannot be grounded, in this case, upon the law of reason, nor upon the law of God; for it is not by these laws, that the husband shall be tenant by the courtesy, but by the custom of the realm; and therefore if such custom help him not, he cannot be aided by conscience; for conscience never resisteth the law of man, nor addeth to it, but where such law of man is against reason or the law of God; in which case it cannot properly be called a law, but a corruption. *Doct. & Stud. lib. 2. cap. 14, 15, 49, 50. Cary's Rep. 11.*

5. Sir Thomas Englefield, the plaintiff's father, was seised of an estate for life in reversion, on two estates, one in *Leicestershire*, the other in *Wilts*, each of 1800*l.* per annum value, expectant upon the lives of two jointresses; remainder to his first and other sons in tail; the remainder in like manner to his brother the defendant, and though he had these great expectancies, yet he had little or nothing at present, and had been sometime in prison, and formerly was married, but had no children of that marriage, and was then sixty years old, and intended never to marry: the *Wiltshire* estate was sold to Sir Robert Howard, whose lady was jointress of that part, and part of the purchase-money 2500*l.* was paid to the defendant for his interest therein, who agreed with Sir Thomas to pay him down in hand 600*l.* and 500*l.* a year for his life, to commence from the death of lady Englefield the other jointress, whose estate the defendant had bought in; (for without her the plaintiff's father having barely an estate for life, expectant on her death, could not make a good tenant to the *Praecipe*) a common recovery was suffered, and fines levied, and the defendant in actual possession: after Sir Thomas married a young lady, had issue the plaintiff, and brought his bill, suggesting fraud and circumvention, but on solemn hearing, his bill was dismissed. It was said that tho' the dismissal is not a bar, plaintiff claiming as remainder-man, yet as the father had not, the son cannot have relief, on pretence of fraud; the plaintiff was not then in being, and his estate imaginary, and of no consideration in law, and was well destroyed by the recovery before he was born; that the agreement was by consent of all friends, and this demand, after twenty years enjoyment, on pretence of fraud; whereas if there was any fraud, it was to the plaintiff's father, whose bill was dismissed; and the plaintiff had no estate in law, not so much as a right; that there was never any thing more than a contingency limited to him, and that fully destroyed before he was born. And the case of *Roscurrocke* and *Barton* was cited; and in this case, if Sir Thomas had seven sons, they would all have several springing equities. But a reconveyance and account was decreed. 1 *Vern.* 443 to 448. *Englefield contra Englefield.* In this case Sir Thomas could have no pretence to be relieved against his own agreement, made in full sense of his interest, for good consideration, and the general benefit of the family, as the same was to the liking of all, and for securing the credit of the name and family, had Sir Thomas still kept in the same mind not to marry; but as he afterwards did marry, and had issue the plaintiff, the reasons of that agreement ceased, and contrary reasons arose from the birth of the plaintiff, in his favour, against that agreement; and on the present circumstances of the case, Sir Thomas must be considered as particeps criminis,

minis, or an actor in the fraud on the plaintiff, who must be understood to be in contemplation on the original settlement of the estate; which was for the preservation of the honour and dignity of the name.

6. See 1 Vern. 14, 164, 294, 295. 2 Rep. Chan. 78. 1 Chan. Ca. 57, 83, 84, 238, 284. 2 Chan. Ca. 64. 3 Chan. Ca. 91, 126. Gilb. 83, 102, 136. Prec. Chan. 233. Max. Eq. 16.

7. See rules, Equality is equity. Equity proper place to relieve legatees. *Est boni judicis ampliare jurisdictionem*. Trust of a term governed by the same rules in equity, as the limitation of the legal estate is at law.

10. *Aequum et bonum est lex legum.*

1. **T**HE true meaning of the statute 31 H. 8. of monasteries, &c. W. 2. 1 Eliz. to restrain ecclesiastics from wasting their possessions, and 1 & 2 Ph. & Ma. cap. 8. are to be favourably expounded, and according to natural equity, for the honour and service of God, religion and truth, without respect to legal ceremonies. 5 Co. 14. a. b. 11 Co. 66. Magdalen Col. Hob. 220. *Ann Needler versus Bishop of Winton*.

2. See rule, It is the office of a temporal judge to advance laws made for religion according to their end, &c.

11. *Agreements and contracts to be on good consideration, or mutual recompence.*

General, and rules.

1. **O**NE is not bound by his assumption or promise, unless it be on good consideration of another thing. 17 E. 4. 4. b.

2. A use may not be raised *sans* good consideration: and such consideration ought to be some cause or occasion meritorious, amounting to mutual recompence, in deed or in law. 21 H. 7. 18. b. Dyer 336. b.

3. A writ of annuity shall be maintained by a parson against a vicar, upon an ordinance of the ordinary, if there be *quid pro quo*. Fitzh. Nat. Brev. 152. G.

* 4. He, who will have the benefit of a mutual agreement, must shew that he has performed his part. See case *Duchess of Hamilton and Duke of Hamilton* before the house of lords, 28 March 1727.

* 5. Contracts are to be adjudged according to the law of the place where they were made. See case *York Buildings Company and Meers* before the house of lords, 23 Nov. 1728.

* 6. Where one person has trifled or shewed a backwardness in performing his part of the agreement, equity will not decree a specific performance in his favour, especially if circumstances are altered. See case before the house of lords *Hayes and Caryl*, 26 Jan. 1702.

* 7. One, who enters into articles in violation of a trust, shall never take benefit by the same articles. See case before the house of lords *Dale and Lynch*, 17 August 1715.

* 8. Equity will not carry unreasonable agreements into execution. See cases before the house of lords, * *Brain and Wooley*, 9 Feb. 1721. * *Carol and Chamberlyn*, 14 July 1721. * *Tap and Stanhope*, 24 Mar. 1720.

* 9. Nor where a person of weak understanding is drawn into it. See said case *Carol and Chamberlyn*.

* 10. Nor where the method of obtaining them was not strictly regular, though the same were in part executed. See *Rockford and Nugent's* case before the house of lords, 22 May 1724. and *Fitzgerald and Eustace* 1733.

* 11. In agreements the ties must be reciprocal. S. C.

* 12. Decreed, that where the articles were not obtained with the strictest fairness, the conveyance made in pursuance of such articles shall be set aside: and the purchase only to stand as a security for the consideration-money. See case before the house of lords *White and Leighborn*, 28 Feb. 1722.

* 13. An agreement made with an infant not binding, because *ex parte*, and remedies not mutual. See case *Conway and Shrimpton*, 19 Jan. 1710. before the house of lords.

* 14. Agreements made in a tavern by surprize, not binding. S. C.

* 15. A contract for stock in the public funds, &c. at an unreasonable price, set aside. See case *Thompson and Harcourt* before the house of lords, 13 Feb. 1721.

* 16. To be set aside where an undue advantage has been taken of the weakness of another's understanding, or circumstances; as being in prison, or the like. See case before the house of lords *Moody and Stewart*, 28 Feb. 1728.

Particular cases.

* 17. The father on his marriage had articulated to settle his whole estate on that marriage, but neglected so to do; when the eldest son of that marriage attained his full age, the father without giving him notice of the articles, and with threats to allow him nothing unless he complied, and on promise to make an absolute settlement on him in case he would comply, prevailed on him to join in making a settlement on the younger children, and thereby to give the father a power to make a jointure on another wife; the father afterwards gives bond to make such jointure, and marries. This bond was set aside, as against the heir, and the first articles established: and the second wife put to seek satisfaction of her bond out of the personal estate. See case *Ivers and Ivers* before the house of lords, 1734-5.

* 18. The father makes his son of the first marriage agree to a provision for the father's second wife and their children, in his, the son's, own wrong, and who was, at the time of the agreement, ignorant of his right, and threatened by his father to be kept at home bare, and without any allowance, if he refused, but if he complied he was to be allowed 260 l. a year for his maintenance, &c. the son was relieved, and the agreement set aside. See case before the house of lords *Scrope & ux' versus Offley*, 24 May 1735.

12. *Alienatio, licet prohibeatur, consensu tamen omnium in quorum favorem prohibita est, potest fieri.*

THE licences of lords immediate and mediate to grant shall enure to two intents, viz. to a dispensation both of the statute of *Quia emptores terrar'*, and of the statute of *Mortmain*; because their deeds shall be taken

taken most strongly against themselves; *Et quilibet potest renunciare juri pro se introducto.* Co. Lit. 99. a. See here of *Non obstantes*, &c. and 4 Co. *Bozoun's case*.

13. *Alligari non debuit, quod probatum non relevat.*

1. **T**HE defendant confessed that in a passion he had burnt his marriage articles: but it appearing he had produced them at a commission since the time he pretended to have burnt them, he was committed to the *Fleet*; and though he after made oath, that he had them not, and could not produce them; and though it was insisted that notwithstanding the burning them was a great misdemeanor, yet a man was not to suffer perpetual imprisonment, because he could not do what was impossible; yet he could not be discharged till he consented to admit the articles were to the effect in the bill. 2 Vern. 561.

2. See 1 Chan. Ca. 11, 45, 56, 77. 1 Vern. 207.

3. See rules, *Nothing shall be a ground to direct a new trial to avoid a judgment at law, that would not be a ground for a bill of review to reverse a decree. In odium spoliatoris omnia praeſumuntur. Iniquity bars equity. He, who hath done iniquity, shall not have equity.*

14. *Almanack, part of the law of the land.*

THE almanack is part of the law of the land, of which the court must take judicial notice. 6 Mod. 41. 1 Salk. 181. S. C.

15. *All the term in law but one day.*

1. **W**HEN a deed is shewed forth to the court, the same shall remain in court all that term, in custody of the *Custos brevium*: but at the end of the term, if the deed be not denied, then the law adjudgeth the deed in the custody of the party to whom it belongeth; for a man's evidences are as it were the sinews of his land; but if the deed be denied, then the deed, in judgment of law, remaineth in court until the plea is determined. Co. Lit. 231. b. 5 Co. 74. b. Fitzb. Nat. Brev. 244.

2. It shall be intended by presumption in law, that a deed inrolled any part of the term was inrolled the first day of the same term; *ſtabit praeſumptio donec probetur in contrarium*; and therefore the plaintiff having in the principal case confessed the inrolment to be after the six months, the presumption vaniſhes, and becomes of no force. See 4 Co. 71. b.

3. All the term is but as one day in law, and therefore a deed produced to the court shall remain in court all that term wherein it was shewn; but when the term is over, it shall go to the party who shewed it. And then it being in custody of the adverse party, another term, and not in court, the defendant cannot have *oyer* of it. 5 Co. 74. b.

16. *Apices juris non sunt jura.*

1. THE law of England respecteth the effect and substance of the matter, and not every nicety or form of circumstance. *Qui baeret in litera baeret in cortice, et apices juris non sunt jura.* Co. Lit. 283. a. b.

2. Seeing that in conveyances, limitations of remainders are usual and common assurances, it is dangerous by conceits, or nice distinctions, to bring them in question. Co. Lit. 299. a.

3. It was said by Coke, lord chief justice, and affirmed by the other judges, that then of late such nice and strained constructions had been made on letters patent, as to destroy the force and effect of them, so that many good letters patent were drawn in question, to the dishonour of the crown, dishonour of the subject, and against the true reason and antient rule of law, as his lordship said appears through the books: and talis certitudo, says his lordship, certitudinem confundit, such nice and captious pretences of certainty confound true and legal certainty. *Et maledicta expositio est quae corrumpit et confundit textum.* And it was adjudged, that where the queen granted a manor to B. and his heirs, in the premisses of the letters patent, to have and to hold the said manor to B. and his assigns, leaving out heirs in the *habendum*, that the fee of the manor passed by the premisses, and the *habendum* was void; for the premisses were sufficiently certain to pass the fee, and the omission in the *habendum* should not destroy or overturn that which was certain by the premisses; for her majesty's intention appears to pass the fee by the premisses, and her grant ought to be taken *secundum intentionem reginae, et non in deceptione reginae*: and when a literal and strict construction is made to make the king's grant void, *contra intentionem regis*, it sounds in deceit of the king, and it is a great indignity to him *propter apices juris*, to make his charter under his great seal, of such things as he might lawfully grant, to be of no effect. *Quia apices juris non sunt jura.* 8 Co. 56. b. 57. a. Vide tout le case.

4. See rules, Equity will not aid new inventions, &c. Law hath always suppressed new and subtile inventions, &c. He who takes security by a penalty, &c. Ca. 1.

17. *Ars naturam imitatur.*

VIDE rule, *Lex spectat naturae ordinem.*

18. *Benedicta est expositio quando res redimitur a destructione.*

1. WHEN the lord of a manor, having many antient copyholds in the same vill, grants the inheritance of all of them to another, the grantee may hold courts for his customary tenants, and accept surrenders for the use of others, and make admittances and grants; for though it be no manor in law, for want of freeholders, yet as to the copyholders, the feoffee or grantee hath such a manor, that he may hold courts for these purposes. 4 Co. 26. b.

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2. Every manor, which consists of freeholders and copyholders, comprehends, in effect, two different courts, viz. One commonly called the court baron, *scil.* the court of the freeholders, who are suitors and judges; the other of the copyholders or copyhold tenants, whereof the lord, or his steward of the manor, is judge: and for this reason, when the lord grants over the inheritance of his copyholds, the grantee may hold such court for the copyhold tenants only, as his grantor before held, &c. for *benedicta est expositio quando res redimitur a destructione.* 4 Co. 26. b. Co. Lit. 58. a.

3. Though the lord, by his own act, may not at common law make of one manor divers manors, consisting of demesns and freeholds, yet he may make a customary manor, consisting of copyholds for the purposes aforesaid. 4 Co. 26. b.

19. Beneficium non datur nisi propter officium.

1. **A** Spiritual office draws with it a right to have the possessions belonging to such office; as in the case of an abbot or parson, &c. *Plowd. Com.* 500. a. b.

2. If the head and members of a college will receive a charity, with a yoke tied to it by the founder, they must bear it; for the charity may not be severed from the yoke; if they will have the one they must submit to the other. *Skin.* 491. *For as the office carries with it the benefice, so taking the benefice is an undertaking to perform the office in such manner and under the modes prescribed by the founder, who as master of his own charity may give it what form he pleases, so he give it legal shape; and sure it must be very indecent for him who thinks fit to take the benefit, to cavil at the terms the founder has thought fit to annex; since he might have left it if he had not liked it.*

3. Though the pope, before his usurped power taken away, made many appropriations *de facto* to nuns, yet he could not *de jure* so do; for a woman cannot be a pastor by the law of God, 1 Cor. 14, 34. 1 Tim. 2. 11, 12. and Dyer, in *Grindon's case*, says well, that it was a thing abominable, and I [lord Hobart] say more, that it was against the law of the realm. Nay, whilst the law of the realm suffered it, and so tacitly admitted it might be done, and that by law, and so part of the law of the realm, yet admitting (for argument sake what I cannot grant) that it was then law, such law was void, as being unrighteous and against the law of God. For it is, as my lord Hobart continues, of the essence of a pastor to be *didacticus* to teach the people, and also to be *hospitalis*, as is the statute of Carlisle, and to do alms and other works of charity in the places where the churches were founded; and it is, and always was, against the law of the realm; for *beneficium non datur nisi propter officium*, and it is no reply that the cure may be served by a curate for them; for the question is not how they can make a curate, but how they themselves are capable: and therefore as in 5 E. 3. 4. *Bro. Pat.* 108. 9 E. 4. 6. and 4 & 5 Ph. & M. Dyer 150. if an office of learning be given to a man utterly insufficient, it is utterly void, &c. *Hob.* 148, 149. Our clergy from this rule, and particularly from this case, might take a lesson, that they are required to reside, to instruct the people, to be hospitable, and charitable, and that in their several parishes, and they ought to be studious to perform these offices, as the question

tion may as well be put to them now, as heretofore to nuns, how they themselves are capable? and not how they may make curates, which indeed of itself is a question might puzzle a vicar.

4. See 3 Lev. 83.

20. *Benigne faciendae sunt interpretationes, ut res magis valeat quam pereat.*

1. **A** Special verdict in ejectment; the declaration was of several messuages in the several parishes of St. Michael, St. James, St. Peter and St. Paul, that part of the premises lay in St. Peter's and St. Paul's; but there was no parish called St. Peter's nor St. Paul's. It was held clearly that the copulative (*et*) should be referred to that which is real and had an existence, *ut res magis valeat*, not to make St. Peter's one parish and St. Paul's another, but both one; and the words *several parishes* are supplied by the other parishes aforementioned; so that if there be any such parish in being, as that of St. Peter and St. Paul, the copulative shall refer to that. As in 6 E. 3. *Praeceptum* of ten acres in A. B. and C. there the lands must lie in every one of the villis; but if the *Praeceptum* were *de manerio et de decem acris* in A. B. and C. there it would be well enough, though the manor lay elsewhere, provided the ten acres lay within the villis named, for then the last words are satisfied by the ten acres. And judgment *nisi*, &c. was given accordingly. *Hard. 336.*

2. See 2 Bulst. 282. Co. Lit. 213, 301. b.

21. *Benignior sensus in verbis generalibus seu dubiis est praeferrendus.*

Rules.

1. **T**HE office of the judges is, on consideration of all the words, to collect the true scope and intention of the speaker, &c. 4 Co. 19. b.

2. *Sensus verborum ex causa dicendi accipiendus est. Et sermones semper accipiendi sunt secundum subjectam materiam.* 4 Co. 13. b. 14. a.

3. It is an excellent point of learning in actions for slander, to observe the occasion of the words being spoken. 4 Co. 14. a.

4. The words ought to have convenient certainty. 4 Co. 15. a. 16. a. 18. a. b.

5. *Sermo relatus ad personam, intelligi debet de conditione personae.* 4 Co. 16. a.

6. Actions are not maintainable for brabbling words. 4 Co. 18. a.

Cases.

1. The plaintiff recited in his count, that whereas he was a justice of peace, surveyor of the duchy of Lancaster, and had several other offices, the defendant said of him, *Mr. Stanhope hath but one manor, and that he hath gotten by swearing and forswearing*: adjudged words not actionable. 1st, Because they were too general, and words, to charge any in an action

tion in which damages are to be recovered, ought to have convenient certainty. 2dly, The defendant did not charge the plaintiff with swearing and forswearing; for he might recover or obtain a manor by swearing and forswearing, and yet he neither be procuring nor assenting to it: and words which maintain an action ought directly to be applied to the plaintiff, and not by collection or inference; for damages ought to be given in regard of the hurt which he hath by the scandal. If one charge another that he hath forsworn himself, this is not actionable; 1st, Because it might be in common conversation, *et benignior sententia in verbis generalibus seu dubiis est praeferenda*. 2dly, It is usually a word of passion and choler; as if one says to another that he is a villain, a rogue, or a varlet, *vel similia*, these will not maintain an action; for *boni judicis est lites dirimere*; but if one say to another that he was perjured or forsworn in such a court, it is actionable; for by such words it appears that he had forsworn himself in a judicial proceeding. And *Wray* lord chief justice said; that the judges had resolved, that actions for scandal should not be maintained by any strained construction or argument, nor any favour be extended for their support, &c. 4 Co. 15. a. b. See 4 Co. cases *Aktionen de scandalis*, ou actions pur slander throughout.

2. Action for these words, *Thou* (praefatam *Johannam* innuendo) *art* *Mutcombe's backney*, *thou art a thieving whore*, and *a pockey whore*, (innuendo that the said *Joan* had the *French pox*) and *I will prove thee a pockey whore*. Moved in arrest of judgment, that the words were not actionable. First, *Thou art Mutcombe's backney*, and the second, *Thou art a thievish whore*, is not an accusation of felony; for she may be thievish in that which is not felony; and for the last, the innuendo cannot make the words to be intended the *French pox*, when it is not shewn by any other circumstances, &c. Judgment for the defendant. *Cro. Ja.* 514.

3. *Action sur le case*. Whereas he was the son and heir of *John and Anne Elborow*, which *Anne* was daughter of *John Travel*, and had land by descent from them of 200 l. per annum; defendant envying his estate, speaking of the plaintiff and *Katherine* his wife, said, shall *Elborow's* wife sit above my wife? he is but a bastard. *Quorum praetextu* he was much scandalized in his estate, and inforced to great expences to defend his title. Moved in arrest, that the words were not actionable; because he doth not shew that there was any speech about his estate, or that he was about selling or leasing out the lands, or that these words were spoken to scandalize his title. And that though the plaintiff said he was scandalized in his estate, and that the words were spoken maliciously, that was only the clerk's drawing and inserting; for it doth not appear that he had any temporal loss thereby; and therefore not actionable. As in *Anne Davis's* case, 4 Co. 17. But all the court, besides *Doderidge*, held them to be scandalous, and adjudged for the plaintiff. *Cro. Ja.* 642, 643.

4. Vide 4 Co. 17. a. b. 18. a. *Cro. Ja.* 240, 241, 673, 674.

22. *Boni judicis est lites dirimere, et expedit reipublicae ut sit finis litium, propter communem omnium utilitatem.*

1. **T**homas Williams, Esq; brought his action *sur le case* against Henry Jones clerk, and declared that the said Jones being vicar of Alderbury in com. Salop. ought and was bound by himself, or other chaplain, to celebrate divine service at Woolaston, at his chapel of St. John, within the site and precinct of his manor of Woolaston aforesaid, within the parish of Alderbury aforesaid, antiently erected, every Sunday and holiday throughout the year, before noon of each of the said days, and to administer the sacraments to the said Thomas, et hominibus, tenentibus et servientibus suis, infra praecinctum ejusdem manerii inhabitantibus, et commorantibus, &c. on motion in arrest of judgment it was resolved, that the action lay not, but the remedy was in the court Christian; but if it had been a private chapel only for Williams and his servants and family, within the said manor, an action had lain on the prescription for the lord; for in such case he only should have had it; but as it was public no action lay, for if the lord should be allowed this remedy, every one of his tenants might have the same, and so there might be infinite actions for one and the same default. *Et boni judicis est, &c.* and yet they shall not be sans remedy; for they may sue in the spiritual court, &c. 5 Co. 72. b. 73. a. Vide 2 Ju. Eccl. 496. et q.

2. One shall not have an action for a nuisance in the highway, for it is common, and no reason that one person should have an action, for by the same reason that one should, every one should; and then the party might be punished an hundred times for one cause: but if any particular person hath a more particular damage than another, for such particular injury he may have his particular action: but such public injuries are remedial in the turns, leets, &c. 4 Co. 73. a.

3. If a man be disturbed of a common way which the law giveth him, he shall have an action on the case, and recover damages; for when ever the law giveth any thing, it giveth also a remedy for the same; *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest*, but a difference is to be taken between a private way and a common one; for if one be disturbed to go in the latter, yet he shall have no action, for the preventing multiplicity of suits; for if one might, all men might, and yet this case is not without remedy, but that is by presentment in the leet or torn: but if one hath a particular damage, as that he and his horse fell into a ditch made athwart the public way, he shall have an action for this special hurt and loss. Co. Lit. 56. a.

4. True it is, that for a nuisance in the highway, without special damage, none shall have a private action; for it is not *damnum privatum*, sed *damnum commune*; and therefore ought only to be punished and reformed at the suit of the king; for a public nuisance shall not be reformed at the suit of a private person; for the damage is not private but public; and therefore the king, who is head of the commonwealth, shall have his remedy. 9 Co. 113. a.

5. In copyhold cases, if the lord will not hold a court, the tenant hath no remedy to compel him to admit him, but in chancery; as is 4 Co. 28.

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Westwick's case, 32 H. 6. 3. *Lit. fo.* 3. for it would be infinite if every copyholder, upon pretence of refusal, might have an action. *Cro. Ja.* 368, 369.

6. See *Lit. chap. Frankalmoigne* 30. b. 27 H. 8. 27. a. 22 H. 6. 46. 1 Ro. 108. Mo. 842. 2 Cro. 491. 5 Co. 101. 2 Ju. Eccl. 495.

7. See rule, *Benignior sensus in verbis generalibus seu dubiis est praefendus*, cases 1, 2, 3.

23. *Bonum necessarium extra terminos necessitatis non est bonum.*

1. **V**IDE *Hob.* 144. Mo. 902. and 1 Ro. 464.

2. Vide rule, *Natura appetit perfectum.*

24. *Caveat emptor.*

1. **C**AVEAT emptor qui ignorare non debuit quod jus alienum emit. *Hob.* 99.

2. If a man buy lands whereunto another hath title, which the buyer knoweth not, yet ignorance shall not excuse him. *Doct. & Stud. lib. 2. cap. 47.*

3. See rule, *Ignorantia facti excusat.*

25. *Causa spiritualis committi potest principi laico.*

1. **R**ESOLVED, that proxies, being in their original nature duties payable for visitation, were grantable to the king, and the king became capable of such grants when the duty was converted into a sum of money certain, in nature of a pension, or annuity; for by the antient law of the realm, the king hath power to visit, reform and correct all abuses and enormities in the church, and the statute of H. 8. but remitted the antient jurisdiction to the crown, which the pope had usurped. Proxy is but a profit of jurisdiction; and *Causa spiritualis committi potest principi laico.* Da. 4. a.

2. So he hath power to dispence with the ecclesiastical laws, &c. *Hob. Colt and Glover's case.* 14 H. 8. 7. *Palm.* 470. Mo. 755, 756. *Hob.* 147. *Davis* 72. b. 73. a. 5 Co. *De Jure Regis Eccl.* 9. 16. b. *Hawk. Pl. Cro. Praemunire, sect. 6.* *Fitzb. Nat. Bre.* 22. a. 27 E. 3. 85. a. 6 H. 7. 14. a. Co. *Lit.* 44. a. 1 Ju. *Eccl.* 13. *Moor and Moor's case* in chancery. The king may dispence with the canons, but a metropolitan cannot, *no nor convocation convoked.* See also 5 Co. *De Jure Regis Eccl.* 17, 26, 28, 51. Da. 76, 77. Mo. 542. *Cro. Eliz.* 527, 542, 601. *Palm.* 25, 26, 27. Da. 91, 92. *Hob.* 81, 82. *Cro. Ja.* 335. *Cro. Ca.* 47, 68, 199, 356. *Dy.* 294. *Ha. Anal.* 19. *Salk.* 294. The Bishop of St. David's case. *Faresl.* 56, 117. S. C. *Gilb.* 181. 2 *Pe. Will.* 119.

3. Vide rule, *Omnes reges dicuntur cleri.*

26. *Cessante causa cessat* } *Effectus,*
 Causatum.

1. **T**HE king granted an office to one at will, and 10*l.* fee during life, *pro officio illo*, now if the king put him from his office, the fee shall cease. 5 E. 4. 8. b.

2. It is no principal challenge to a juror, that he hath married the party's mother, if she be dead without issue; for the cause of favour is removed. 14 H. 7. 2.

3. If after the lord had the wardship of the body and land, the lord released to the infant his right in the feignory, or the feignory descended to the infant, he would be out of ward, both for the body and land; for he was in ward in respect he was not able to do those services which he ought to have done to his lord, and which now are extinct; and *cessante causa cessat causatum*. Co. Lit. 76. a.

4. If I make a lease of my lands, excepting all trees, which grow out of any wood, but upon the lands, by this exception the soil is not excepted, *as would be if they grew in a wood or grove*, but sufficient nourishment out of it is reserved, to preserve the vegetative life of the trees, without which they must perish: but if the lessor fell them, or with leave of the lessee rid them up, and eradicate them, there the lessee shall have the soil; for *cessante causa cessat effectus*. 11 Co. 49. b.

5. The church and religious houses, after that procurations were reduced to a sum certain, paid them to ordinaries, tho' visitation ceased, so that the rule *Cessante causa*, &c. doth not hold in such cases. Da. 3. a.

6. Vide Co. Lit. 70. b. 248. a. 4 Co. Lutterel's case. Davis 1. b. Hob.

27. *Cessa regnare si non vis judicare.*

1. **T**HE estates and persons of ideots and lunatics are, by law, intrusted to the king; (4 Co. 127.) if therefore the king should grant to one who intrudeth upon the possession of an ideot or lunatic, or takes their persons unlawfully, that he would not meddle with them, but let them do their pleasure, these grants were void; for to defend the subject is an act of justice, and office of a king which he cannot put off: *cessa regnare si non vis judicare*. And in these things the king is never supposed by law ill affected, but abused and deceived; for *eadem praesumitur mens regis, quae est juris*. So 7 H. 4. 42. the earl of Kent's case, if the king being but guardian grants the land in fee, the grant is void. So resolved 7 Co. 36. That the king cannot give away a penal law. So if the king having a lapse, should grant to an intruder that he would not present to the church, or if one should usurp upon the king's lapse, and the king should grant to the usurper, that he would not remove his clerk; the grant would be void. For this were a breach of that trust which the law reposed in the king. Hob. 155. *The prince's contentment ought to be the happiness of the subject, and the subject's welfare the security of the prince: having from this firmness of union, mentem sanam in corpore sano.*

2. See

2. See rules, *Actus legitimi non recipiunt modum*, case 6. *Admiralty not to hold plea of matters cognizable at law.*

28. Chancery only controulable by parliament.

Judgments given in chancery are not to be controuled or reversed in any other court, than the high court of parliament, which is the chiefest of all other courts in this realm. 2 *West's Prec.* 177. a.

29. Chancery not tied to the rules of the common law.

THE absolute power of chancery is not tied to the rules of the common law, but thereby matters may be examined *omnibus viis et modis quibus rei veritas melius sciri poterit*, and adjudged *secundum allegata et probata*, and not by jury of twelve men, as at common law; but by examination of witnesses, as in the courts of the civil law. *Smith de Repub. Angl. lib. 1. cap. 12.* Neither is such precise form of pleading used in chancery as at law, nor may advantage be taken for mispleading, or want of form, so as the substance of the matter be sufficiently disclosed in conscience. *Divers. Cur'* 106. 9 E. 4. 15. 24 E. 3. 45. 14 E. 4. 7. 37 H. 6. 43. 29 Aff. 13.

30. Chancery not to be ousted of its jurisdiction.

1. ONE may not sue in the chancery of *Chester*, for a thing which in interest concerns the chancellor there; for that he may not be his own judge; therefore in this case the party ought to sue in the chancery of *England*, for otherwise there should be a failure of right. *Ro. Abr.* 374.

2. In chancery, between Sir *John Egerton* and *The earl of Darby, Chamberlain of Chester, and others*, for a farm in that county, Resolved, by the lord chancellor, the chief justice of *England*, the master of the rolls, *Doderidge* and *Wynche*, justices, 1st, That the chamberlain of *Chester* being sole judge of equity, cannot decree any thing wherein himself is party; for he cannot be judge *in propria causa*; but where he is party the suit shall be heard in chancery, *coram domino rege*. 2dly, If the defendant dwelt out of the county palatine, he, who hath cause to complain in equity, may also complain here in chancery; for in respect that proceedings in chancery do bind the person only, if the person be out of the jurisdiction, the chamberlain of *Chester* cannot relieve the party; and therefore *ne curia domini regis deficeret in justitia exhibenda*, the suit shall be here in chancery, else the subject should have good right and no remedy, which should be inconvenient: and this pursues the reason of the common law, &c. although an action will lie in *Wales*, yet where he, who hath cause of action, cannot have justice there, he shall sue in the king's bench; for where the particular courts cannot do justice to the parties, they shall sue in the king's general courts at *Westminster*, &c. In all cases where it appears to the court, that those, who have liberty to take cognizance, do fail of right, as in matters of foreign plea, &c. the matter shall be determined in the general courts of *Westminster*. 3dly, The king cannot grant commission to determine any matter of equity, but it ought to be determined in chancery, which hath

hath had, time out of mind, jurisdiction of those matters, and that by the law, &c. On consideration of the certificate of lord Dyer & alⁱ, justices in queen Elizabeth's time, concerning the jurisdiction of the county palatine of Chester, it was resolved, that for things transitory, though within the county palatine, the plaintiff may alledge them to be done in any place within England, and the defendant may not plead to the jurisdiction of the court, that they were done within the county palatine. 12 Co. 110. See Dyer 202, 716.

3. The bill was to be relieved against the grant of an annuity or rent-charge of 300*l. per annum*, charged upon his lands in Ireland, setting forth, that the same was obtained from the late lord Arglass here in London, by a fraudulent practice by the defendant, who pleaded to the jurisdiction of the court, the lands being in Ireland. Plea over-ruled, and the defendant ordered to pay costs for endeavouring to oust the court of its jurisdiction. 1 Vern. 75, 76, 77, 135.

4. The bill was for relief concerning a trust of certain lands in Ireland; the defendant appeared and answered; without objecting to the jurisdiction of the court. But lord chancellor objected, this court could not hold plea of lands in Ireland, and lord Arglass and Muschampe, Pitt, and Arnold's cases were cited by counsel for the plaintiff; but lord chancellor over-ruled them because of the fraudulent bargains in lord Arglass's case made in England: and there could be no failure of justice in the present case; for they might have a subpoena out of this court returnable in the chancery of Ireland, as in cases between masters and apprentices in London; he had known subpoenas out of this court returnable in the mayor's court in London for persons who lived out of the jurisdiction; but, at the importunity of the plaintiff's counsel, gave them a week's time to search precedents: and after Sir John Holt, counsel pro quer', cited the case of Lake and Lord Ranelagh, 8 Co. 1. in lord Coventry's time, Archer and Preston, soon after the restoration, and the case of lord Thomond and Spencer, for precedents in this court, for decrees made concerning lands in Ireland. The defendant's counsel cited Sir William Petyt's case, and the case of The countess of Laucharte versus Obrian, 24 Car. 2. the case of Smith and Wheeler, &c. After long debate, the judges concurred with his lordship, that the court had jurisdiction, and that judges in England were expositors of the Irish laws. The case of Barnwel and Rochford, a trial was directed touching a feoffment of lands in Ireland. Lord chancellor cited Sir William Tiringham's case, decreed issue at law and changed the Venue to the county of Salop. 1 Vern. 405, 406. Ro. Abr. 597. 2 Rep. Chan. 188. 1 Vern. 167, 168.

31. Charity to pursue the intent of the founder.

1. A Decree of the commissioners of charitable uses was reversed for varying from the intent of the founder or donor. 2 Mod. Ca. 64, 65.
2. On exceptions to a decree of commissioners, the chancellor must decree according to equity, and the true intent and meaning of the donors and founders. Du. Ch. Uses 127.
3. A man devised 50*l. per annum*, for a lecture in polemical or casuistical divinity, so as the reader was a bachelor or doctor in divinity, and fifty years of age, and would read five lectures every term, and at the end

of each term deliver fair copies thereof to be kept in the university; and in default of such lecturer, he gave the said 50*l. per annum* to ——— college in *Oxon*. Now the university of *Cambridge*, with the consent of the heir at law, would have mitigated the rigour of the qualification, viz. That a man of forty, and three lectures each term, and to deliver copies once a year. But the lord chancellor held them to the letter of the charity, and said that the heir had no power to alter the disposition made by his ancestor. 1 *Vern.* 55, 56.

4. Lord *Rich*, founder of the hospital, among other rules, directs no leases should be made for longer than 21 years, and the old rent to be reserved, and no more, and that the fine should not exceed two years value. The farm of *B.* part of the hospital lands, had been leased accordingly at 18*l. per annum*, and some corn rent, but the price of provision increasing, the hospital (40.) made a lease, reserving the old rent, but took a deed of covenant from the lessee to pay an additional rent of 32*l. per annum*, over and above the reserved rent. In (59.) the hospital, at the recommendation of lord *Warwick*, made a lease to *Atwood* senior, for 21 years, at the old rent of 18*l. per annum*, and by deed of covenant the lessee covenanted to pay 32*l. per annum*, additional rent, and the hospital covenanted from time to time to renew, till the term was made up sixty years, and in (79.) made a new lease accordingly; in (82.) the lease was renewed at the old rent, and an indorsement on the back of the deed of covenant of (59.) that, during the term of the last lease, the lessee would pay additional rent. Sir *John Freacke* who had purchased of *Atwood*, brought a bill to have his lease renewed, pursuant to the covenant in (59.) and upon hearing, his bill was dismissed; the covenant to renew till the term made up sixty years, was contrary to the rule of the founder; whereupon Sir *John* refused to pay the additional rent, but was decreed to pay it, being on a different foundation; the additional rent being on account of the price of provisions being dearer, and the further leases were in consideration of the money to be laid out in the improvement of the premises, that Sir *John* paying the same might enjoy for the remainder of the 21 years. 1 *Vern.* 410, 411, 422.

5. The case was, Dr. *Radcliffe*, the late physician, by will devised 300*l. per annum* to two persons to be chosen by the archbishop of *Canterbury* and certain other trustees out of *University* college in *Oxon*, which sum he directed to be paid them for ten years for their maintainance, five years whereof they were to spend in *England*, in the study of physic, and the other five abroad; the defendant was one so chosen, and studied here according to the direction of the will, and for that time received his salary; but after he did not go abroad on account of his ill state of health, and thereupon anno 1730 he resigned to the trustees, who accepted his resignation, and chose another in his room anno 1735; the present information was exhibited against the defendant that he might account for five years salary, by him thus received. Mr. *Fazakerly* for the defendant argued, that in a late case, which came before the house of lords upon an appeal, their lordships were of opinion that the word *maintenance* included education, and therefore though that word was used in the present will, education must be intended by it as implied; he also argued that when the defendant had spent half his time in his education here in *England*, and was prevented by ill

ill health from going abroad, and thereupon had resigned, and his resignation accepted, and another chosen in his room, he submitted it, that the present bill must be thought an unreasonable one. My lord chancellor was of that opinion, and said the name of the case cited was *Gandy and Anstis*, so dismissed the information. 2 Ju. Eccl. 157, 158.

6. The intention or will of founders or donors shall bind the king though not named, as appears in *statuto Templorum*, anno 17 E. 2. where it is said *ita semper quod pia et celeberrima voluntas donatorum in omnibus teneatur et expleatur, ut perpetuo sanctissime perseveret*. And the act *de donis* is notable to this purpose, for there it appears that it was both necessary and profitable that the will of the donor should be observed; the words of which act to the present purpose are, *propter quod dominus rex perpendens quod necessarium et utile est, &c. apponere remedium* (and what was that remedy?) *statuit quod voluntas donatoris in charta doni sui manifeste expressa de caetero observetur*, which binds the king himself, as in lord Berkley's case, where it is said, that men ought to observe the intent or will of others, and that to break them is very bad, &c. 11 Co. 72. b. 73. a.

7. See 8 Co. 131. b. *Skin.* 491. 1 *Vern.* 42.

32. Children are de sanguine patris et matris, sed pater et mater non sunt de sanguine puerorum.

VIDE rule, *Pater et mater et puer sunt una caro*.

33. Clerici non ponantur in officio.

General.

1. HOLY church shall enjoy her liberties in quietness. *Stat.* 14 E. 3. cap. 1.

2. A priest not to be arrested doing divine service. *Stat.* 50 E. 3. 5. 1 R. 2. 15.

3. The common law, to the intent that ecclesiastical persons might the better discharge their duty in celebration of divine service, and not be entangled with temporal business, hath provided, that if any of them be chosen to any temporal office, he may have his writ *de clerico infra sacros ordines constituto non eligendo in officium*, &c. and thereof be discharged. *Co. Lit.* 96.

4. If a man, who holds certain lands or tenements, by reason of his said lands or tenements be elected into the office of bailiff, beadle, or reeve, or other like office, if he be a clerk, or within sacred orders, he ought not to be elected to such office; and if he be notwithstanding so elected, &c. he may have a writ to discharge him, in the form in *Fitzb. Nat. Brev.* 175. (B.) and in the *Register*.

Particular cases.

5. Dr. Lee having lands within the level, was made an expeditor by the commissioners of sewers; whereupon he prayed his writ of privilege in this court, and it was granted him; for the *Register* is *vir militans Deo non*

non implicetur secularibus negotiis; and the antient law is *quod clerici non ponantur in officio*. 1 Vent. 105. Dr. Lee's case, 1 Mod. 282. S. C.

6. A writ of privilege was prayed to be excused from the office of expeditor; 1st, because being an ecclesiastical person he ought not to be put in such office; 2dly, for that all the lands he had in the level, are in lease for 99 years. Writ granted by *Rainsford* and *Moreton*, they only being in court. *Moreton* for the first cause, and *Rainsford* for the second. 1 Lev. 303.

7. *Raymond* prayed a *Mandamus* to exempt him as archdeacon from being expeditor to commissioners of sewers, being a secular office, and inferior to his degree; on 2 *Inst.* 3. &c. court granted it *nisi*. 2 Keb. 693.

8. *Cur*: The clergy are liable to all public charges imposed by act of parliament; as the principal case was for not sending his cart and horses to the repairs of the highways, *sur le stat. ch. 2*. 1 Vent. 273.

34. Colleges and other like bodies not to alien but sub modo the allowance of the law.

General.

1. **STAT.** 1 *Eliz.* was made for the benefit of successors, that their possessions might not be charged or impoverished; wherefore all such grants as are against the successor, are void. *Cro. Ca.* 49.

2. Stat. 1 *Eliz.* was always construed to redress the mischiefs which were at law, upon grants confirmed by deans and chapters, to the prejudice of successors. 5 *Co.* 2, 3. 8 *Co.* 49. *Cro. Ca.* 50, 51.

3. At a parliament holden *Mich.* 43 & 44 *Eliz.* for consideration of a bill for confirmation of conveyances made by subjects to the queen, and of letters patent from the queen to subjects, resolved by the judges, assistants to the lords of parliament of the upper house, That leases made to the queen, by colleges, deans and chapters, wardens of hospitals, or others having spiritual or ecclesiastical livings, against the provision of the act 13 *Eliz. cap.* 10. are restrained thereby, as well as leases made to other persons. 1st, Because they are disabled by the act to make any lease, gift, grant, &c. but only in the form by the statute prescribed; and if they cannot make estates, the queen can take none from them, &c. 2dly, The statute 1 *Eliz.* which restrains bishops from making estates, hath a special provision that they may make them to the queen, which proves that had not such provision been made for the queen, as the act disables bishops to make estates, the queen might not take estates from them, contrary to the provision of the said act. But no such provision is in the said act of 13 *Eliz.* 3dly, In divers cases the queen is bound by act of parliament, though not named, nor bound by express words; and therefore in all statutes made to suppress tort, or to take away fraud, or to prevent the decay of religion, the king is bound though not named; for religion, justice and truth, are the supporters of the crown and diadems of kings, and therefore it is agreed 35 *H.* 6. 60. that the king shall be bound by the statute *W.* 2. 1 *Eliz.* &c. *Summa ratio est quae pro religione facit.* 5 *Co.* 14. a. b.

* 4. By statute 18 *Eliz.* all leases made by colleges, in which one third of the rent is not reserved in corn, are declared void. And the corn so reserved

served is ordered to be applied to the use of the college, on pain of deprivation of the head or governor, and all others consenting to any misapplication. See case *The Bishop of Ely versus Bently*, D. D. 6 May 1732, before the house of lords.

5. All innovations within the mischief of the acts against the impoverishing of successors, dilapidations, and decay of spiritual livings, and hospitality, &c. are by favourable construction taken to be within the laws provided against such abuses. 5 Co. 14.

6. In the principal case the lords of parliament, being informed that divers deans and chapters, colleges, &c. had made leases to the queen, as pretending the queen was not bound by the said act 13 Eliz. caused a clause to be added in the first branch of the act of confirmation, that it should not extend to make any lease, grant, &c. good to the queen by any ecclesiastical persons, &c. who had not power by the laws and statutes of the realm to make it, which is more than was in the act of confirmation 18 Eliz. which was made to manifest the matter to the laity; for it was held by the judges that the general words of the act 18 Eliz. hath not enabled such ecclesiastical persons to make leases, or estates to the queen, which by the said act 13 Eliz. were upon good and important considerations disabled. 5 Co. 15. a. b.

Particular cases.

7. It was adjudged between the dean and chapter, and bishop of *Hereford* and *Ballard*, that the grant of a next avoidance of a benefice by the dean and chapter was within the purview of the statute against their alienations. So if they grant a rent-charge out of their possessions, it is within the equity, &c. 5 Co. 15. a.

8. Where an archdeacon makes a lease for three lives according to the acts, and the lessee leases for 100 years, and the archdeacon, bishop and dean and chapter confirm it, yet it shall not bind the successor. So where the parson of *Weston* demised his rectory to *Hodges*, then parson of the same rectory for 50 years, who assigned to *Throkmorton*, the bishop confirms, living the lessor, and good: in which last case it was resolved, that forasmuch as the said lease was before the statute 13 Eliz. and so not restrained by it, the confirmation made after the act to perfect the lease, was not within the purview or intention of it, &c. 5 Co. 15. a.

9. A grant of the officialty of an archdeacon or commissary to a bishop to two, where they were only grantable to one for life, and being granted in reversion, is void by the statute against successors, for the statutes restrain all grants against the successor, besides grants of necessity, and leases for three lives or 21 years, where the antient rent is reserved; and all other grants, as well of offices as other things not warranted by the statutes are made void against the successors. Vide 10 Co. 60. 5 Co. 14. and case between *Vaughan* and *Crompton*, 14 Ja. where it was adjudged, that a grant in reversion of the office of *Register* of *Hereford*, was void, &c. *Cro. Ca.* 259, 49, 50. The office of parkership and stewardship, and other offices which are of necessary use to bishops, are allowed to be grantable, though they are new offices and new fees, if reasonable; and of the necessity of them, and of the reasonableness of the fees, that court shall judge. *Cro. Ca.* 48, 49, 50.

10. The offices of the officialty of an archdeaconry and of commissary of a bishop, are grantable by statutes 1 *Eliz.* and 13 *Eliz.* because, as was pretended, not parcel of the possessions of the bishopric or archdeaconry, so as they could not have any profit by them, and so not restrained by the statutes. Resolved they were within the words and intent of the statutes. *Gro. Ca.* 258, 259.

11. Vide *Gro. Eliz.* 18. 11 *Co.* 66. *Magdalen College's case.* *Hob.* 220. *Anne Needler's case.*

35. *Communis error facit quasi jus.*

According to *Hanke*, 11 *H.* 4. 37. *Papa omnia potest*, and *Hill*, there 77. acknowledgeth him *haut et grand souveraigne*, from whom all ecclesiastics have their power. And *Thirning* there calls him *Apostle*; from whence it followeth by consequence, though upon a false ground, that his ecclesiastical acts must be allowed lawful, as upon the clearing the king's supremacy, when the clouds of ignorance were dispersed, the consequence of his power was as clearly declared, 25 *H.* 8. *cap.* 21. *sect.* 2. and yet the crown always kept a possession of it's natural power of dispensations *in spiritualibus*, 11 *H.* 4. 60. to retain a benefice with a bishopric, and 11 *H.* 7. 12. double benefices; and so it came to this that *communis error facit quasi jus*; when it arose from the error and sufferance of state and of courts of justice both; for *res judicata pro veritate habetur*, though it be not so indeed. *Hob.* 147. 2 *R.* 3. 7.

36. *Conditions extinct in part, all extinct.*

1. WHERE a condition dispensed in part, extinguishes wholly, as being odious in law. The case of revocation is clean contrary. *Hob.* 313.

2. See 3 *Ch. Ca.* 67, 70, 86, 88.

37. *Condition none may take advantage of, but who is either party or privy to it.*

IF a man give lands of his own meer motion to *H.H.* and to his heirs by indenture, upon condition that he shall yearly, at a certain day, pay to *J.S.* out of the same lands a certain rent, and if he do not, that then it shall be lawful for *J.S.* to enter, &c. if the rent in this case be not paid, yet may not *J.S.* enter, for there is an antient maxim in the law, that no man shall take advantage of a condition, but he that is party or privy to the condition, and this man is not party nor privy; wherefore he shall not have advantage of it. And though the feoffee intended, if the rent was not paid, that the stranger should enter, yet as that is against law, the intent is void, but the feoffor himself may re-enter; for when the feoffment was made upon condition that the feoffee would pay a rent to a stranger, therein was concluded, that if the rent was not paid the feoffor might enter; for the words imply so much though it be not expressed; and when the feoffor went further, and said that if the stranger was not paid he should

should enter, these words were void in law, and so the effect of the deed stood upon the first words; wherefore the feoffor may re-enter in law and conscience, but *J.S.* in neither. *Doct. & Stud. lib. 2. cap. 20.*

38. Condition to avoid a freehold cannot be pleaded without deed.

THough the rule be, that a condition to avoid a freehold cannot be pleaded without deed, yet of a chattel it is otherwise. *Doct. & Stud. lib. 1. cap. 8.*

39. Conditions which go to the defeazance of estates are to be taken strictly.

VIDE rules, *Transit tenementum cum onere. Limitations in restraint of marriage, &c.*

40. Conditions precedent must be literally performed, not so of subsequent conditions, where the court can make compensation.

ROGERS married his niece to the plaintiff's father, and having lands to the value of 1500*l. per ann.* devised them to the defendant and others, to pay debts, and after for the use of the plaintiff and his heirs male; and declared his will, that the plaintiff should have no benefit, unless Sir *F. Popbam*, the plaintiff's father, should settle on the plaintiff two thirds of his estate, settled on the said father on his marriage, and on default thereof devised the same to his said trustees discharged of the said trust; the father, to give his son title, makes a settlement with power of revocation; the trustees brought their bill against Sir *Francis* to compel him to make a settlement according to *Rogers's* will; he answered he had made a settlement, but if it was not sufficient, he was ready to make such an one as the court should direct; but before any thing done, Sir *Francis* died, leaving a will whereby he revoked all former settlements, and devised all his estate to the plaintiff, his son, first to pay debts, then to the plaintiff for life, then to his first, second, third, and so on to his tenth son in tail, &c. which whole estate was alledged to be 6000*l. per annum*, and the debts not above 30000*l.* the plaintiff brought this bill to discover what debts the trustees had paid, and to have an account, and be let into the benefit of the devise: it was said the trust was executed by the statute, the words being *In trust for the use and benefit of the plaintiff*, and therefore he might seek his remedy at law, which was true, but still he was proper here in this court. (*Fry and Porter's case* cited, and 1 *Salk.* 236.) Lord chancellor: This is no trust, but an estate vested at law, and well executed by the statute of *Uses*; it is a condition subsequent; precedent conditions must be literally performed, and this court will not vest an estate where by reason of a condition precedent it will not vest at law: but of conditions subsequent, which are

are to devest an estate, it is otherwise; and there is a difference where the court can compensate in damages for non-performance, where it is just and equitable to relieve, but where it cannot give damages, there it will not relieve. If the substance of a condition is performed, though not the precise words, it is sufficient: but if the quantity of the estate should fall short, that might make a new case, and referred to a master—that point, and also to take account, &c. 1 Vern. 79. &c. and 167. *(Vide post. rule, Law favours justice and truth, &c. case, 22.)*

41. *Conscience must always be grounded upon some law.*

1. **V**IDE Doct. & Stud. lib. 2. cap. 14. 15. cap. 49. cap. 50. Ca. Rep. 11.
2. See rule, *Aequitas sequitur legem*, case 4.

42. *Conscience never resisteth the law of man, nor addeth to it, but where such law of man is against reason, or the law of God.*

1. **V**IDE Doct. & Stud. lib. 2. cap. 14. cap. 15. cap. 49. cap. 50. Cary's Rep. 11.
2. See rule, *Aequitas sequitur legem*.

43. *Consensus est voluntas multorum, ad quos res pertinet, simul juncta.*

DEAN and chapter are not confined to their chapter-house, but may assemble and do their acts elsewhere; and therefore it is held 21 E. 4. 26. that where a deed bears date *in domo capitulari*, averment might be, that this deed was delivered elsewhere, to which intent in 27 Aff. 23. the case of the *Prior alien*, yet they ought to assemble in some certain place, and that the major part be there present when they give their consent to any common acts; also the consent of the major part of the chapter ought to be given at the same time, *simul & semel*, and not scatteringly and at several days; for it is not a consent, or not properly so if not *simul*; for *Consensus est voluntas multorum, ad quos res pertinet, simul juncta*, and therefore *si consentiant ut singuli & non collegialiter, cum actus per communem consensum debeat expediri, non valet*, &c. Dav. 48. a. b.

44. *Consensus non concubitus facit matrimonium, et consentire non possunt ante annos nobiles.*

1. **R**esolved, that an infant within the age of consent shall be in ward; for that the marriage is incomplete; for that to every marriage there ought to be consent; for *consensus non concubitus facit matrimonium, et consentire non possunt ante annos nobiles*. 6 Co. 22. a. b.

2. In the case of *M.* who was sued in the court Christian for marrying his wife's sister's daughter, a prohibition was awarded, because such marriage is not forbid by the *Levitical* law. *Mo.* 907.

45. *Constructio legis non facit injuriam.*

1. **W**HEN the construction of an act is left to the law, the law, which abhorreth injury and wrong, will never so construe it, as it shall work a wrong. *Co. Lit.* 42. a.

2. *Legis constructio non facit injuriam*, and therefore if tenant for life maketh a lease for life generally, this shall be taken, by construction of law, an estate for his own life who made the lease; for if it should be a lease for the life of the lessee, that would be a wrong to him in the reversion. And so it is if tenant in tail make a lease for life generally, the law shall construe this to be such a lease as he may lawfully make, and that is for term of his own life; for if it should be for the lessee's life it would be a discontinuance, and consequently the estate which should pass, by construction of law, would work a wrong. *Co. Lit.* 183. a. b. 42. a. Yet if in the premises lands are letten or a rent granted, the general intendment is, that an estate for life passeth, but if the *habendum* limit the same for years, or at will, this qualifies the general intendment of the premises, and the reason of it is this maxim, *Quaelibet concessio fortissime contra donatorem interpretanda est*, which is to be so understood that no wrong be done thereby. *Co. Lit.* 183. a. Therefore on the maxim, that every man's deed is to be taken most strongly against him, it is that the grantor shall have as large an estate as the other could lawfully grant. And the other maxim is to be so construed, that it be without prejudice to another, &c.

3. It is a general rule, whenever the words of a deed, or of the parties without deed, may have a double intendment, and one stands with law and right, and the other is wrongful and against the law, the intendment that standeth with law shall be taken. *Co. Lit.* 42. a. b. 183. a. b.

4. To shut up this point, it hath been adjudged, that where tenant in tail made a lease to another for life generally, and after released to the lessee and his heirs, though between the tenant in tail and his lessee a fee-simple passed, yet after the death of the lessor, the entry of the issue in tail was lawful, which could not be if it had been a lease for life of the lessee, for then by the release it had been a discontinuance executed. *Co. Lit.* 42. b.

46. *Constructions to be according to what was the beginning.*

1. **I**F a servant leave his master's service, and after kill his master, upon a malice that he bore him whilst he was his servant, this is petit treason. 33 *Ass. pl.* 7.

2. The king being seised of the manor of *Beverly* in *Yorkshire* in fee *in jure coronae*, a stranger erected a shop on a vacant plot of the manor, and took the profit of it without paying any rent to the crown; and after the queen granted the manor in fee to the earl of *Leicester*, who never either entered or took any rent for it: after the occupier of the shop died in possession, and his son entered: this is no descent to toll the patentee's entry;

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for by his first erecting of the shop he could gain nothing against the king. Dy. 266. b.

47. *Constructions to be according to what was the cause.*

1. **A** Man makes me swear to bring him money to such a place, or else he will kill me; I bring it him accordingly; this is felony in him. 44 E. 3. 14. b.

2. So if he makes me swear to surrender my estate unto him, and I do so afterwards; this is a disseisin to me. 14 Aff. pl. 19 Hil. 15 E. 3.

3. So if one is imprisoned to make an obligation of a future day at another place, which he being at large accordingly doth; yet he shall avoid it by duress. 6 R. 2. 8 H. 6. 38 H. 6. 13.

4. Outlawry of trespass is no forfeiture of lands, as outlawry of felony is, for though the not appearing be the cause of outlawry in both, yet the force of the outlawries shall be esteemed according to the heinousness of the offence, which is the principal cause and foundation of the process. 3 E. 3. 84.

5. A man and feme sole have a villain, and intermarry, and the villain purchaseth lands, they cannot have the land by intireties, but by moieties jointly or in common, as they had the villain. Fi. Law Engl. 10.

48. *Constructions to be secundum aequalitatem rationis.*

1. **T**HIS equality of reason in an especial manner shineth and sheweth forth itself in the construction of statutes; in extending things there provided, to mischiefs in equal degree, whereof there are many pregnant examples; and also in the guiding the grounds and maxims of things which newly arise, by the rule of the common law. Fi. Ley 6. b. 15. a.

2. At common law uses were nothing, but now being become as inheritances, they are esteemed as other inheritances; so as there shall be a *possessio fratris* of an use. And the use of the land in *borough English* shall descend to the youngest son. 5 E. 4. 7. But it shall not extend to collaterals, as tenancy by the curtesy, dower, descent to toll entry, &c. 4 Co. 22.

3. A recognizance is acknowledged by the ancestor, or judgment is obtained against him in an action of debt, and he dies seised of two acres, one whereof is held in *Borough English*; or if he hath issue two daughters who make partition, or if he die *sans* issue, so as part of his land descend to the heir on the part of the father, and part to the heir on the part of the mother, in all these cases, if one only be charged, he shall have contribution against the others; for they are *in aequali jure*. 3 Co. 12. b.

4. Two, four or more severally seised of lands join in recognizance, all their lands shall be equally extended. 3 Co. 13.

49. *Constructions to be with equity and moderation, therefore to moderate the rigour of law.*

1. **T**HE words of the law are not the law, but the just meaning thereof is it; *ratio legis est anima legis*, and sometimes the sense is to be

be taken larger than the letter of the law, and sometimes it may not be extended so far as the letter, and equity is the judge thereof, which enlargeth or diminisheth the letter according to what is equal in the case: this method of correcting the letter of the law is often necessary, and frequently used. As when an act of parliament is made, that whoever doth such an act shall be a felon, and as such shall die; yet if a man *non sane memorie*, or an infant of tender age, who hath not discretion, do the act, they shall not be deemed felons, or put to death. So if an act was made that all, who receive, or give meat or drink, or other assistance or succour, to one doing such an act, shall be accessories to his act, and be put to death, if he was consant of the fact; yet if one doing this act come to his own wife, who, though she know the matter, receives, and gives him meat and drink, she shall not be accessory or guilty of felony; for in the generality of the said words of the law, men of *non sane memorie*, infants, femes covert, were not included in the intent: so equity corrects the generality of the law in these cases, and abridges the words, &c. *Plow. Com. 465. a. &c.*

2. It is no trespass for a man moderately to correct his apprentice. 21 E. 4. 53.

3. Nor to take and carry away another man's wife against the husband's consent, if it be to a lawful intent; as to sue a divorce against her husband; or to have the peace against him before a justice of peace. 21 H. 7. 13.

Consuetudo. See Custom.

50. *Consuetudo est altera lex.*

CUSTOM is the soul and life of copyhold estates, for either without custom, or if the copyholder break the custom, he is at the will of the lord; yet observing the same, he is as well intitled to his estate according to the custom, as he who hath a freehold at law; for *Consuetudo est altera lex.* 4 Co. 21, 23.

51. *Consuetudo est optima interpres legum.*

THE judges of the law construe the grants of the king beneficially for his honour, and the benefit of the subject; and not strictly or literally to the subversion of such grants. 6 Co. 5. Sir John Mollins's case.

52. *Consuetudo ex certa causa rationabili usitata privat communem legem.*

1. CUSTOM in intendment of law is such an usage, that hath obtained *vim legis*, and is in truth a binding law to such particular place, person and things which it concerns: and such custom may not be granted or established by grant of the crown, 49 E. 3. 3. a. nor even by act of parliament, but is *jus non scriptum*, and made by the people of such a place only, where the custom runs, for where the people have found any act or thing to be good and beneficial, and apt and agreeable to their nature

ture and disposition, they have used and practiced the same immemorially, and so, by frequent iteration and multiplication of such act, custom cometh, and being used time out of mind, obtaineth the force of a law. And so the rule 44 E. 3. 19. is true, that no law shall bind the people, but such as is made by their consent, for consent may be expressed as well *facto* as *verbo*, and that which is expressed *facto* is stronger, and that which is expressed by many acts, and continual acts of the same kind is custom; and so briefly custom is a reasonable act iterated, multiplied and continued *per le people de temps dont memorie ne cont.* And this is the definition of a custom which hath the force of law. And every custom is not unreasonable which is contrary to any particular rule or maxim of positive law; for *Consuetudo ex certa causa usitata privat com. legem*, as the custom of *ga-welkind* and *borough English* are against the maxims of descent of inheritance: so the custom of *Kent*, The father to the bough the son to the plough, &c. and every custom which may be hurtful to the interest of a private person, is not therefore void, &c. *Da. 32. a. b.*

2. *Consuetudo ex certa causa rationabili usitata privat communem legem, quia consuetudo contra rationem introducta potius usurpatio quam consuetudo appellari debet. Consuetudo praescripta et legitima vincit legem. Co. Lit. 113. a.*

3. Custom ought to be certain; for *incerta pro nullis habentur. Da. 33. a.*

4. It ought to be certain, reasonable, and used with continuance. *Da. 33. a. b.*

5. Custom is sometimes admitted to derogate from the common law; for *consuetudo bona de causa usitata et approbata privat communem legem. Calthorpe's Readings of Copyholds, fo. 20. Da. 33. a.*

6. By custom a man may devise that his executors may sell the tenements he hath in fee-simple, for a certain sum to distribute for his soul; here the executors may sell to whom they please, and oust the heir; for a custom used upon a certain reasonable cause, depriveth the common law. *Lit. sect. 169. Consuetudo sine veritate est vetustas erroris. Continuance without truth is the antiquity of Error.* In *Littleton's* time a man could not devise his lands but by custom; but now he may do it generally by statutes 32 H. 8. cap. 2. 34 H. 8. cap. 5. &c.

7. See 4 Co. Copyhold Cases. *Calthorpe's Readings, &c.*

53. *Consuetudo semel reprobata non potest amplius induci.*

General.

1. CUSTOM ought to have continuance *sans* interruption for time immemorial; for if it hath been discontinued within the time of memory, the custom is gone. *Da. 33. b.*

2. When a man hath a lawful easement by prescription, another custom immemorial may not take it away. 9 Co. 58.

Particular cases.

3. As if a copyhold is leased by the lord for life or years, according to the course of the common law, it shall never after be demised as a copyhold according to the custom; for as continuance maketh a custom, so discontinuance destroyeth it. *Nihil tam conveniens est naturali aequitati, quam unumquodque dissolvi eo ligamine quo ligatum est. Da. 33. a. b.*

4. Though a *Modus* for tithes had been varied by subsequent composition for sixty years, and had been once paid in kind, yet that did not destroy the *Modus*. 2 *Ju. Eccl.* 122. See the case at large 1 *Ju. Eccl.* 449, &c.

54. *Consuetudo vincit communem legem.*

CUSTOM and immemorial usage may create and consolidate inheritances; for *consuetudo vincit communem legem*. 4 Co. 21. a.

55. *Contingency may not depend upon a contingency.*

1. IN the case at bar the demise made to *Thomas* depended upon a contingency precedent, and upon a meer uncertainty, so that until that happened, the interest or term intended to be demised is not certain, nor the land bound by it. And as *Thomas* died before it was reduced to any certainty, the lease could never take effect, or vest in his executors or administrators, for the reasons given in arguing the cause. It was also objected against the demise to *Thomas*, that if he had been alive, yet it could never have vested in him; for he died before *Ralph* or *William*, and they survived *Elizabeth*, and by the express condition precedent, *Ralph* might not take unless *Elizabeth* died within the term, and *William* could not take unless *Ralph* died *infra terminum praedictum*, which is as much as to say, that if *Ralph* died before *Elizabeth*; for the term is for 80 years, if she should so long live, and *Thomas* might not take unless *William* died in the life of *Elizabeth*, sc. *infra terminum praedictum*, and *William* and *Ralph* also survived *Elizabeth*, so that both contingencies failing, viz. the death of *Ralph*, and the death of *William*, in the life of *Elizabeth*, the demise to *Thomas* could never commence; and the demises to *Ralph* and *William* are both void, yet the limitation precedent, (viz. the death of *Ralph* and *William* in the life-time of *Elizabeth*,) as to the lease to *Thomas*, is not void; for that his interest might depend upon both contingencies, and so was the intention of the parties, which was affirmed *per totam curiam*; and lord chief justice *Popham*, put this case, If *A.* demise to *B.* for 30 years, after the death of *C.* if *C.* die within 10 years next coming; if *C.* survive the 10 years, the term shall never take effect. So in the principal case his lordship said, the lease to *Thomas* could not commence, unless *William* died before *Elizabeth*; but he survived her, therefore the lease to *Thomas* could never commence. And his lordship further said, the lease to *Thomas* was void for another reason, namely, that it might not commence upon a contingency which depended upon another contingency; as here the demise to *Thomas* depended upon the contingency annexed to the demise made to *William*, and the lease to *William* depended upon the contingency annexed to the demise to *Ralph*; and to this purpose he cited 12 *Aff. pl.* 5. *A.* leased to *B.* *sur condition*, that if *A.* paid to *B.* 10*l.* within such a certain time, that he should re-enter, and if he did not pay before the day, and *B.* paid him 10*l.* at a day after, that he should have fee: they neither pay the money, and after both days *A.* enters, and *B.* ousts him, *A.* brings assise and took nothing by his writ. 1 Co. 153. *The Rector of Chedington's case, ove tout le case.*

2. *Nicholas Searle* devised to his niece *Mary Bryant* and the heirs male of her body, upon condition, and provided she intermarry with, and have

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issue male by one surnamed *Searle*; and in default of both conditions, he devised to *Elizabeth Bryant* in the same manner, and in default thereof he devised to *George Searle* for 60 years, if he so long lived; remainder to the heirs male of the body of the said *George*, and their issue male for ever. It was adjudged, 1st, That the devise to *Mary* was a good devise of an estate-tail, and so was the estate to *Elizabeth*, but it is an especial intail, it is to her and to the heirs male of her body, begotten by a *Searle*, which is a middle intail, not the highest nor the lowest; for it might have been to her and the heirs of her body, begotten by *George Searle*, which had been more particular, yet this is a good estate-tail within the statute *de donis*; for it is within the reason of the statute. 2dly, The words *upon condition*, &c. though they are expresse words of condition, shall be taken to be a limitation. So it is held 1 *Ven.* 199, 202, and chief justice *Holt* said, he saw no reason why they might not be so construed in a deed, though the law had not been carried so far. And so the sense is, if she have no issue by a *Searle*, upon her death, the estate shall remain over. 3dly, That the estate-tail of *Mary* and *Elizabeth*, or either of them, doth not cease by marrying with one who is not a *Searle*, for the remainder over is in default of both conditions, and in the mean time it is limited to her, and the heirs male of her body, and she may survive the first husband, and marry a *Searle*, and so there is a possibility as long as she lives. If the estate had been to *Mary* and the heirs male of her body, by a *Searle* to be begotten, provided and upon condition if she do marry any but a *Searle*, that then it shall remain, and be to *George Searle* and his heirs. *A common recovery suffered before marriage would not have bar'd the estate-tail and remainders; and though she after married with another, it should not have avoided the recovery.* And the court took a difference between a collateral condition and a condition that runs with the land. If the donor reserve a rent with a condition to re-enter, a recovery will not bar it; otherwise it is, if it be to re-enter for non-payment of a sum in gross. *Salk.* 570.

3. Vide 2 *Co.* 72. 2 *Cro.* 461. *Perk. Par.* 745. 3 *Ch. Ca.* 29, 50. 1 *Mod.* 108, 111. 1 *Co. Rector of Chedington's case* throughout.

56. Contracts are to be taken according to the intent of the parties, expressed by their own words.

1. **A**LL contracts are to be taken according to the intent of the parties expressed by their own words, and if there be any doubt in the sense of the words, such interpretation must be made as is most strong against the grantor or obligor, that he may not by obscure wording of the contract find means to evade and elude it. *Gilb.* 249.

See rules, *Law regards the intention of the parties. Equity is to execute the intent of the parties. In things of election the party is to shew that he hath made it.*

57. Contra negantem principia non est disputandum.

SEE rule, *Principia probant et non probantur.*

58. Copyhold must be immemorial.

1. IF a copyhold be leased by the lord for life or years according to the course of the common law, it shall never after be demised again according to the custom; for *Consuetudo semel reprobata non potest amplius induci*; for as continuance makes a custom, so discontinuance destroys it. *Nilil tam conveniens est naturali aequitati, quam unumquodque dissolvi eo ligamine quo ligatum est.* Da. 33. b.

2. See 4 Co. Of Copyholds, Calthorp's Readings of Copyholds.

59. Copyholder derives his estate from custom, and not out of the estate of the lord.

1. A Copyholder doth not derive his estate out of the estate or interest of the lord only; for then the copyhold estate should cease, when the estate of the lord determined. But it was resolved, that the life and soul of a copyhold is the custom of the manor; and when the grant or admittance is made by any one having a lawful estate or interest, the copyholder is in by the custom, without any regard to the estate or person of the grantor, &c. 4 Co. 23. b. 24. a.

2. Where the lord of a manor, wherein are many copyholders for life, marries, and after a copyholder dies, and the lord after his coverture grants the lands again according to the custom of the manor for life, and dies, the wife shall not avoid this grant in a writ of dower. 4 Co. 24. a.

3. So if feoffee of a manor *sur* condition, make a voluntary grant of copyhold estate, according to the custom, and after the condition is broken, and the feoffor re-enters, yet the grant by copy shall stand. 4 Co. 24. a. Vide Dy. 342.

60. Copyholder is in by him who surrendered, and not by the Lord.

1. WHEN a copyholder surrenders to the use of another, and the lord admits him, now he, who is so admitted, is in by him who made the surrender, &c. for the lord is nothing but an instrument to make the admittance, and he, who is admitted, shall not be subject the charge or incumbrance of the lord, &c. 4 Co. 27. b.

2. When the lord hath made his admittance according to the effect of the surrender, nothing remains in him but the reversion of the estate. 4 Co. 29. b.

3. When the tenant of a copyhold surrenders the land to the lord to the use of another, the lord by the custom (which makes the law in such case) hath but a customary power to make admittances *secundum formam et effectum sursum-redditionis*, and though the lord should grant the lands to another, that would be a thing without warrant; for he ought to do it according to the surrender, and he who is admitted shall be in by him who made the surrender, and not by the lord; for if the lord, after such surrender,

der, grant to *Cestuy que use* and a stranger, it shall all enure to *Cestuy que use*. So if he admitted *Cestuy que use* upon condition, the condition is void. 4 Co. 28. b.

4. When a copyholder surrenders into the hands of the lord to the use of M. and K. without limitation of any estate, they shall have but an estate for life; for as well estates as descents shall be directed by the rules of the common law, as a necessary consequence upon the custom, unless there be a special custom (which always hath been observed) within the manor, that these words *sibi et suis*, or *sibi et assignatis*, or the like, might create an estate of inheritance: and the estates in these cases are limited upon the surrender, and are always annexed to the estate of him to whose use the surrender is made. And always the surrender to the lord is general, without limitation of any estate: the lord is but an instrument in this case, and when he hath admitted according to the effect of the surrender, nothing remains in him but the reversion. 4 Co. 29. a. b.

5. The lord is bound in conscience to hold a court to admit. 4 Co. Dy. 264. a.

61. *Corpus humanum non recipit aestimationem.*

IF a *Ca. Sa.* be executed, that is in law sufficient for the whole debt; for *Corpus humanum non recipit aestimationem*, so that if you take it at all, you must take it for the whole debt. Hob. 59. According to *Braët. Minima poena corporalis est major qualibet pecuniaria*. And *Rush.* saith, *Mortuus homo non est homo, and a prisoner is a dead man: perdit domum, familiam, vicinos, patriam*; and therefore the last named author well calls imprisonment a civil death.

62. *Cuilibet in sua arte perito est credendum.*

1. SEE Co. Lit. 125.

2. Vide rule, *Quod quisquis norit in hoc se exerceat, sicut ad quaestionem facti non respondent iudices, ita ad quaestionem juris non respondent iuratores.*

63. *Cui licet quod majus, non debet quod minus est non licere.*

1. RESOLVED, that where the custom of the manor was, that copyhold lands might be granted in fee-simple, that a grant to one and the heirs of his body is within the custom; for be it a fee-simple conditional, or estate-tail, it is within the custom: so he might grant for life or years by like custom; for an estate in fee-simple comprehends all. 4 Co. 23. a. 30. a.

2. See 5 Co. *De jure regis Eccl.* 6. b. 7. a.

64. *Cujus est dare, illius est disponere.*

1. A Creditor agrees with his debtor to take less than his debt, so he be paid by such a day, the debtor fails of payment, and brings his bill, suggesting some equitable excuses for not making precise payment; and

and that he tendered within two or three days, but the defendant refused, and sued at law for the whole. Demurrer, for that the bill contained no equity, and that the plaintiff having failed, he was not bound to take less; and demurrer allowed. 1 Vern. 211.

2. Lord keeper in this case said, he was fully satisfied it was not originally a mortgage, but an absolute purchase, but his lordship believed *Sabine* might complain he had sold his estate too cheap, and that thereon *Barrel* might declare if he would pay his money within a year, and 100*l.* for his pains, he should have his estate again; and cited Sir *Anthony Cage's* case, of a clause to repurchase, and said that where there was a clause to repurchase, that the time limited ought to be precisely observed. And as to serjeant *Barrel's* agreement, it was but reasonable for his trouble; for that the estate was more valuable, as having gone through a lawyer's hands, who understood the title, and that might be a means to encourage purchasers. So dismissed the bill. 1 Vern. 268, 269. Note; *To make it a mortgage, were cited the cases Cole and Martin, and Beale and Collins.*

3. A college is the founder's creature, and he may give it what shape he pleases, so it be a legal one. *Skin.* 502.

4. The founder's will is his reason, in disposing and ordering his own, and we may not take this power from him, because we think it unreasonable. *Skin.* 481.

5. Every man is master of his own charity, to appoint and qualify it as he pleases. *Skin.* 481.

6. The authority of the founder to visit, is an authority by the common law, &c. and whereof the courts of law will judicially take notice, but that of a visitor constituted, is not so, but derivative and limited. *Skin.* 497.

7. The court intends that the visitor will do right. *Skin.* 454.

8. A visitor by appointment has no greater authority or power, than the founder giveth him, he is the founder's creature, and receives his being, power and authority, from him, and he may not exceed the power given him; *Qui potest dare potest disponere.* *Skin.* 454.

9. Charities founded and endowed by private persons, are subject to the private government of those who erect them; and therefore if there be no visitor appointed by the founder, in all such cases of eleemosynary corporations, the law doth appoint the founder and his heirs to be visitors; they are patrons, and are not to be guided by the common known laws and rules of the kingdom; but such corporations are to be governed by the particular laws and constitutions assigned them by the founder. *Skin.* 483.

10. *Visitation* is a sacred trust, and if it be invaded, a prohibition lieth; and this is the privilege of every founder, upon the general rule of reason, *Cujus est dare, &c.* and this is mentioned in the case of *Phillips and Bury*, *Show. Parl. Ca.* 51. 4 *Mod.* 112. and *Stillingsfleet's* case, 413, &c. *Gilb.* 178 to 183.

11. Vide *Gilb.* 165, 182. *Show. Parl. Ca.* 51. *Skin.* 497, 454. *Fitz. Nat. Brev.* 42. *A. B. C. D.* *Skin.* 474, 646, 479, 485, 489, 492, 493, 495, 498. 8 *Aff.* 29, 30. 1 *Mod.* 12, 82, 84. 3 *Lev.* 211. 3 *Mod.* 295. 4 *Mod.* 106. 5 *Mod.* 404, 452, 236, 238, 240, 241. 1 *Show.* 74. 1 *Keb.* 166. 1 *Vern.* 456, 457. 1 *Pe. Will.* 326. 2 *Ju. Eccl.* 188, &c. 196, &c.

65. *Cujus est divisio, alterius est electio.*

1. **W**HERE parceners agree that the eldest sister shall make partition of the tenements, she is to chuse last after all the others. *Lit. ch. Parceners, sect. 245. Brac. lib. 2. 77. Fleta, lib. 5. cap. 9. Brit. cap. 72.* gives the preference, as does *Lit. sect. 244.* (where partition is by an indifferent person) to the eldest sister, yet this descendeth not to her heir, as are these books, and *Co. Lit. 166. b.* But where the eldest sister is not an actor in the partition, it not only descends, but shall go to her husband who is tenant by the curtesy, or to her assignee; for the rule of law is *Cujus est divisio, alterius est electio*; for the reason of the law is, for the avoiding of partiality, *Ipsae etenim leges cupiunt ut jure regantur*, which might apparently follow, if the eldest might both divide and chuse. *Co. Lit. 167. a. b.*

2. *Thomas Wilson* brought prohibition against the bishop of *Carlisle*, and said that there was within his parish of *Graystock* this custom for tithing of wool, that if an inhabitant have five fleeces or above, that after sheering and binding up of the said five fleeces *absque fraude et dolo, fideliter solvet rectori post monitionem, &c. apud ostium domus mansionalis ejusdem inhabitantis infra parochiam praedictam, decimam partem inde absque aliquibus visu vel tactu novem partium ejusdem lanae resid' per rectorem habendum vel scrutandum in plenam, &c.* and that the parsons have accepted it; and then lays, that the bishop of *Carlisle* pretending himself parson or commendatory, &c. the bishop pleads himself parson, &c. and demurred in law to the custom. And it was adjudged for the bishop; for the substance of the prescription is laid, that the very true tenth is and ought to be paid, without fraud, which is not prescriptible; for it is common right; then the sole point prescriptible is, that this is without view or touch of the nine parts, which in effect is repugnant to the other; for when you have laid truth in the former part, you lay the way to fraud in the latter; for it is against common reason, that any man should judge or divide for himself, and then take choice of his own division, against the rule of partition. *Lit.* For the truth of the tenth depends upon the proportion it holds with the nine parts; and therefore for the parishioner, who is in the nature of an adversary, to set out a part for the tenth, which he only affirms to be just, is to give him power to tithe as he lists: and it's a weak answer to say, that if it be not a just tenth, he may refuse it, and sue for his due; for first he hath no means to know or be assured whether it be true or not; so his suit may be causeless, sure he may be, it will be fruitless: but the law was provided not to engender but prevent suits; and therefore provideth that things be done by indifferent means and persons, that there be no suspicion of indirect dealing. If a man be judge in his own case, and judge amiss, a writ of error would redress it: so if a bishop disturb or would not admit the clerk, he might be compelled; yet the law provides better, that is, that you have your right; and therefore that your means be such as is likely to produce it. You may challenge the array or polls, you shall remove the *Venire facias* to another officer, as the coroner, where the sheriff is suspected in law, by a provisional challenge afore, to avoid delay, which is a kind of injury. *Hob. 107, 108.*

Custom. See Consuetudo.

66. *Customary inheritances, such as copyholds, shall not have any collateral qualities which do not concern descents.*

1. **W**HERE the custom is, that copyholder may grant in fee, he may grant any lesser estate; for fee-simple includes all. 4 Co. 23. *a.*
2. A man shall not be tenant by the curtesy, *sans* special custom. 4 Co. 22. *b.*
3. A wife shall not be endowed of a copyhold but where there is a special custom; but where she is so dowable, she shall have all incidents thereto. 4 Co. 30. *b.*
4. See 4 Co. *Copyhold cases*, and *Calthorpe's Readings*.

67. *Custom cannot be grounded upon fraud.*

1. **T**HE *East-India* company sued their factor for an account of 12000*l.* in gold he carried hence into *India*; he on his account demanded (according to the usual custom) allowance for so much paid for custom to the king of *India*; it was insisted that he did not pay it: so on the question, whether the factor or the merchant should have the benefit of the custom? it was referred to two merchants, they certified that by the course of merchants the factor should retain; for that if the principal freight, by his non-payment had been lost, he must have answered it to the employer; and so run the hazard wholly. And in this case, the factor by the law in *East India*, had it been discovered that he had concealed the gold, and not entered it in the custom-books, would have lost his life as a felon. Two other merchants certified the employer was to have the benefit of the non-payment of the customs. And upon these certificates it was decreed, that the factor should have the benefit of the customs; for it was a duty to be paid, and the employer could make no title to it against him that was in possession; and he that hath possession hath right against all but him that hath the very right. 1 *Chan. Ca.* 25.

2. The factor had stolen the customs of certain goods, of which a bill was to have account, and to discover whether he had paid the said customs or not? The defendant by answer insisted, he was not bound to answer that part of the bill; for that the plaintiff, who was the employer, was not intitled to these customs, nor any advantage thereof whether they were paid or not. On exception, the master certified the answer sufficient. On exceptions to the report, the case above (*Smith and Oxenden*) was cited, but it was insisted for the plaintiff, this case was not like that; for that was of custom stolen from a foreign king, and this was of custom stolen from our own king; and that it would be of evil consequence, and an encouragement to evil factors, if the court should give an opinion for them in a matter of fraud, as this was. And whereas it was insisted by the defendant's counsel, that it was the course of merchants, that factors should have the benefit

benefit of customs themselves, and not the principals; because the penalty would fall on the factor if discovered: it was declared that could not be called a custom, being grounded upon fraud; and therefore the court ordered that the defendant should answer whether he paid the custom or not. 1 Chan. Ca. 30. Vide *Smith against Oxenden*, 1 Chan. Ca. 25. *Antiquity joined with verity is to be revered, but without verity it is only oldness of error. That only is truly currant which is antiently true; therefore what is founded in error, no usage can support.*

3. The defendant employed the plaintiff as his factor beyond sea, and brought an action of account against him, and had judgment *quod computet*; the plaintiff brought his bill here to have an allowance upon account for what he had saved without paying the custom for those goods (which could not be allowed before the auditor, as was said); and an allowance was decreed against the employer; and so referred to a master to take the account. 1 Chan. Ca. 76. Note; *This case is founded upon the rule of equity, that he shall have satisfaction who would have sustained the loss, i. e. where he is not particeps criminis, but if he be criminal himself, it is otherwise; for one shall not take advantage of his own wrong.*

4. *Hix*, a tinner in Cornwall, articed with *Papilion* to sell and deliver to him sixteen tons of tin, free from all customs and duties; part of the price was paid, and the rest secured to be paid; after the tin was seized, for that the coinage had not been paid, which by the custom of the *Stannaries* is a forfeiture, in case the tin be sold before coinage paid or secured: and because the forfeiture was by *Hix*, *Papilion* sued him to be relieved, he having covenanted to deliver it custom free. Lord chancellor dismissed the bill, saying, I will break this trade between the tanners and the merchants: for by this trade the king is couzened, and the coinage duty seldom answered. 1 Chan. Ca. 256.

5. The plaintiff made *Willet* his factor to sell linens for him; he took them up at the custom-house, &c. and sold them to the defendants *Wingfield* and *Bowater* for 115*l.* and before payment died indebted by specialty more than his assets would extend to pay, and (*int' al'*) by covenant, on his marriage, to leave his wife, if she survived him, 3000*l.* his widow administered, and insisted the 115*l.* in the hands of *Wingfield* and *Bowater*, was liable not only in equity to reimburse her what was due to *Willet* as factor, but should come into the assets, and be liable to her articles and the debts by specialty. Decreed the money to be paid the plaintiff, discounting thereout what was due to *Willet* as factor, and that with costs, as having made an ill defence to satisfy her articles out of the plaintiff's estate; a factor is in nature of a trustee, and though he has right at law, yet he is in equity but a trustee. 2 Ven. 638.

6. Where a factor smuggles foreign customs, and yet sets them down to his master, as paid *sur* account; chancery would not relieve, for that the factor ventured his life. But *North*, lord keeper, said he was not satisfied of it, for that he ventured his master's goods, as well as his own life. *Skin.* 149. *And quære whether this is not wrong, as it is an argument for foreigners to do the same by us; for by a parity of reason, that our traders may do it to other foreign governments, others may do it to us.*

7. In this case, a difference was taken by my lord chancellor, that if an executor, or trustee of money, place it out in the funds or on other security, whereby

whereby he gains considerably, he shall have the whole benefit to himself, in respect of the hazard he run of being a considerable loser thereby, which he must have born. But if such trustee or executor were an insolvent person at the time of placing out such trust-money, there the *Cestuy que trust* shall have the whole benefit gained thereby, as he only could have born the loss thereof, if any had happened; the trustee or executor, by reason of his insolvency, being incapable thereof, and consequently running no hazard at all. *Prec. Chan.* 505.

68. *Debile fundamentum fallit opus.*

1. **I**F a spiritual corporation, to which a church is appropriate, be dissolved, the church becomes disappropriate. 3 E. 3. 74.
2. A lord confirms the estate of the disseisor (of lands in antient demesne) to hold free, yet after it is recovered by the disseisee, it shall be antient demesne again; for the estate, upon which the confirmation enured, is defeated. 49 E. 3. 8.
3. When the estate, whereunto a warranty is annexed, is defeated, the warranty is also defeated. *Lit. cap. Warranty.*

69. *Decreta conciliorum non ligabant reges nostros.*

1. **W**Hatsoever the pope did in this kingdom was of no force, but *coram non iudice.* Hob. 146.
2. *Decreta conciliorum non ligabant reges nostros.* Mo. 906.
3. Mo. 542, 755, 756. 5 Co. de Ju. Regis Eccle. 1, 2, 5, 10, 13, 14, 15, 23, 28, 40. 4 Inst. 342, 343. Co. Lit. 44, 99. 5 Co. 51. 11 Co. 49. 22 Aff. pl. 5. Da. 4, 51, 52, 71, 72, 76, 88. Hob. 143, 147, 81, 82. Pal. 463, 470, 477. Fitz. Nat. Brev. 22. Cro. Eliz. 527, 542, 601. Cro. Jac. 37, 335, 517. Cro. Ca. 47, 68, 199. Ha. Annal. 18, 19, 23, 24.
4. *Vide rules, De una praesumptione ad aliam transivit Romanus pontifex. Rex est mixta persona, &c. Rex est monarcha et imperator, &c. Omnes reges dicuntur clerici. Causa spiritualis committi potest principi laico.*

70. *De non apparentibus et non existentibus eadem est ratio.*

1. **L**ORD Hobart, Prudence is *Quod dubitas ne feceris. De non apparentibus et non existentibus eadem est ratio.* Hob. 295.
2. The matter of an indictment ought to be full, exprefs, and certain; and not to be maintained or supported by argument or implication, &c. 4 Co. 44. b.
3. The indictment being *Verdictum, id est dictum veritatis*, and matter of record, ought to import all the truth which is necessary by law; for *De non apparentibus, &c.* 4 Co. 47. a. 48. a.

71. Descent tolls an entry.

General.

1. **A**S descent is the worthiest means to come to lands, so hath the heir more privilege than any that by other order or means come to lands, &c. In antient time if the disseisor had been in long possession, the disseisee could not have entered upon him, nor upon his feoffee, if he had been a year and a day in quiet possession: but now the law is changed in both cases; only the dying seised being an act in law, doth hold at this day, and this was the law before the conquest: and one reason of this antient law may be, says lord Coke, that the heir cannot suddenly, by intendment of law, know the true state of his title: and for that many advantages follow the possession and tenant, the law taketh away the entry of him, who would not enter upon the ancestor, who is presumed to know his title, and driveth him to his action against the heir that may be ignorant thereof. To a descent to toll an entry dying seised is necessary; and it must be of such tenements as are corporeal and lie in livery, and not of inheritances incorporeal which lie in grant, as advowsons, rents, commons in gross, and such like; for descents of such do not put him, who hath right, to an action; and the reason of the difference is, for that houses serve for the habitation of them; and lands are to be manured for the sustenance. The like law is of an abatement, or intrusion, and of their feoffees or donees, &c. *Co. Lit. 237. b.*

2. Descents which toll entries are in two manners, (to wit) where the descent is in fee, or in fee-tail: descents in fee which toll entries, are as if a man, seised of certain lands or tenements, is disseised by one who hath issue and dieth seised, so that the lands descend to such issue by course of law, and not by his own act, wherefore his entry is taken away, and he is put to his writ of entry, &c. to recover. *Lit. sect. 385.* Descents in tail, which take away entries, are as if a man be disseised, and the disseisor giveth the land to another in tail, and the tenant in tail hath issue and dieth seised, and the issue enter, in this case also the entry of the disseisee is taken away, and he is put to his writ of entry *sur disseisin* against the issue of the tenant in tail. *Lit. sect. 386.*

3. At common law if the disseisor, abator or intruder, had died seised soon after the wrong done, the disseisee and his heirs had been barred of their entry, without any time limited by law; but now by the stat. 37 H. 6. 1. except such disseisor, &c. had been in peaceable possession of such manor, &c. whereof he died seised, for five years next after such disseisin, &c. *sans* entry or continual claim, &c. the entry is not taken away, &c. but after five years the disseisee must make such continual claim; and it is said, says lord Coke, that abators and intruders are out of the statute, because the statute being penal only extends to disseisees, which was the most common mischief, *et ad ea quae frequentius accidunt jura adaptantur.* Also the feoffee of the disseisor is out of the statute and remains at common law, and whether the disseisin be with or without force, the law is the same; for this statute is to be taken favourably, for advancement of the antient right, (*as is, as I conceive, every other statute*). Bodies politic and their successors are within this statute, &c. *Co. Lit. 238. a. b. Vide etiam 240. a.*

4. A difference is to be taken between a right for which the law giveth remedy by action, and a title for which the law giveth no such remedy, but by entry only; as where the feoffee upon condition, as in *Lit. sect. 391*. hath a right to the land, his entry is taken away, because he may recover by action; but where he hath no remedy by action, his title of entry cannot be taken away, because he hath no remedy by action: therefore, if his entry should be taken away, he would be for ever barred. So is the law in case of *Mortmain*; so where a woman hath a title to enter *Causa matrimonii praelocuti*, no descent shall toll the entry; so it is of a devisee; so of the king's patentee dying before entry; and the reason of this difference is, because there is but a title, and no remedy by action in these cases, &c. *Co. Lit. 240. a. b.*

5. The general rule is, that it is not lawful for any man to enter upon a descent, yet the reasonableness of the law excepteth from this rule or ground, an infant who hath right, and hath suffered such descent, and him also who hath made continual claim, and suffereth them to enter notwithstanding, &c. *Doct. & Stud. lib. 1. cap. 17. etiam cap. 8.*

6. If he in reversion disseise his tenant for life, and die seised, this is a descent to take away the entry of tenant for life, but this is not sufficient to toll the entry of a stranger; because as to him it is but the estate for life still, and but a fictitious and not a descendable estate. *Hob. 323. Co. Lit. 238. a.*

Particular cases.

7. In a writ of right between *Plat* demandant and *Holford* tenant, the defendant pleaded that he was within age, and in by descent, and prayed that the parol might demur till his full age; whereunto the demandant replied that he was seised until the tenant disseised him, and traversed the descent; and day was given to the tenant to advise what he would do. *Hob. 266.*

8. Tenant in tail having agreed to sell, and received part of the consideration money, was decreed to sell, but stood out to a contempt, and died. A bill was brought to revive against the issue in tail, but was dismissed; for though the tenant in tail had power, and might have barred the issue, yet as he did not execute that power, he is not concluded; for tenant in tail did not do the necessary acts, (to wit) levy fines or suffer any recoveries for the barring the issue. *Prec. Chan. 278.*

9. The heir is not to be disinherited but upon a necessary implication. *1 Vern. 323, 376.*

10. See *Lit. 95. Co. Lit. 241, 242, 243, 245, 246, 247, 248, 249, 250, 253, 289, 298, 328, 336, 337, 338, 353, 362, 364, 388.* See also *Continual claim and discontinuance, and Stat. 32 H. 8. cap. 13.* See rule, *Law favours justice and truth, &c.*

72. Designatio unius personae est exclusio alterius; et expressum facit cessare tacitum.

1. **T**HE law shall never seek out a person where the parties themselves have appointed one; as if the condition on a mortgage be to pay the mortgagee or his heirs the money, and he die before the day, it must not

not be paid to his executors, but to the heir; but if the condition was to him, his heirs or executors, there the mortgagor is left to his election. *Co. Lit.* 210. a.

2. If a man makes a feoffment in fee *sur* condition, that the feoffee shall pay the feoffor, his heirs or assigns, 20*l.* at such a day; and before the day the feoffor makes his executors and dies, the feoffee may pay the same either to the heir or the executors; for they are his assignees in law to this intent. But if a man make a feoffment in fee *sur* condition, that if the feoffor pay to the feoffee, his heirs or assigns, 20*l.* before such a feast, and before the feast the feoffee maketh his executors, and dieth, the feoffor ought to pay the money to the heir and not to the executors, for the executors in such case are no assigns in law; and the reason of the difference is, because in the first case the law must of necessity find out assigns, and there cannot be any assignee in deed, for the feoffor had but a bare condition, and no estate in the land which he could assign over; but in the other case the feoffee hath an estate in the land, which he may assign over; and where there may be assigns in deed, the law shall never seek out or appoint any assigns in law; and though the feoffee made no assignment of the estate, yet the executors cannot be assignees, because assignees were only intended by the condition to be assignees of the estate: but if the condition be to pay the money to the feoffee, his heirs or assigns, and the feoffee make a feoffment over, it is in the election of the feoffor to pay the money to the first feoffee, or to the second feoffee, and so if the first feoffee dieth, the feoffor may pay the money either to the heir of the first feoffee, or to the second feoffee; for the law will not force the feoffor to take knowledge of the second feoffment, nor of the validity thereof, whether the same be effectual or not, but at his pleasure; and the first feoffee and his heirs are expressly named in the condition. *Co. Lit.* 210.

3. If a feoffment be made on condition, that if the feoffee pay to the feoffor at such a certain time 20*l.* then the feoffee shall have the land to him and his heirs; but if he fail at the day, that then it shall be lawful for the feoffor or his heirs to re-enter, &c. and afterwards, before the day appointed, the feoffee sells the land to another, and makes a feoffment; if the second feoffee tender the money at the day to the feoffor, who refuseth, &c. the second feoffee hath an estate in the land, clear of the condition; and that because the second feoffee hath an interest in the condition for the safeguard of his tenancy; or if the first feoffee after such sale tender the money, &c. this shall be good enough for the safeguard of the estate of the second feoffee, because the first feoffee was privy to the condition; and so the tender of either of them two is good, &c. *Lit. sess.* 336. And in all good dealing the first feoffee ought to pay the money, and save the estate of his feoffee. *Co. Lit.* 208. a.

4. See the rule, *Expressum facit cessare tacitum.*

73. *De una praesumptione ad aliam transivit Romanus pontifex.*

AFTER the bishop of Rome had taken upon him to be the spiritual prince or monarch of the whole world, he attempted to give laws to all nations, as a mark of his sovereignty; but well knowing *quod ubi non est*
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condendi

condendi autoritas, ibi non est parendi necessitas, he offered his laws with caution ; and therefore at first he caused certain rules for the government of the clergy only, and which he called decrees, and not laws or statutes : which being received by his obedient clergy, he then attempted to draw the laity to obedience thereto : and first he propounded certain rules or ordinances for fasting days, to be observed by the laity as well as clergy, which he called by the moderate name of *Rogations*, and not laws or statutes : but when he found laymen, out of their blind zeal, took in these ordinances of abstinence, then this impostor went further, and carried on his incroachments, making still more and further rescripts and orders, to bind not only his obsequious clergy, but also the laity ; as well sovereign princes as their people, and that not only in spirituals, but in matters concerning their civil and temporal estates and rights ; so monstrous were the impositions of this usurper ; for *De una praesumptione*, &c. See Da. 69. b. 70, 71, &c. 1 Ju. Eccl. *The course of the popes usurpation, &c. and the opposition the same met with, &c.*

74. *Deus solus haeredem facere potest, non homo.*

IN case of descents of inheritances, the law respecteth primogeniture, birth-right, proximity, and the intire blood ; but it gives no regard to the worthiness or sufficiency of the heir ; and therefore the law casts inheritances upon ideots, infants, &c. as well as upon men of discretion : the law respecteth not the dignity of the person in case of descent of an inheritance ; for *Primogeniture* has a prerogative given it by the law of God, and therefore is so preferred in our law, and is most worthy. *Dav. 35. b. 36. a.* See *Bract. 62. Co. Lit. &c.*

75. *Discovery draws with it relief.*

1. A Person, who had furnished necessary tackling for a ship, which was afterwards sold, prays a discovery of the personal estate of one of the part-owners, who was dead, and to have relief against his executors and the surviving part-owners. Lord chief baron *Gilbert* said, that the chief distinction upon the rule, that discovery should draw with it relief, seemed to be that where a discovery is prayed, and a liquidated debt admitted by the answer, the court might then proceed to give relief ; but where the debt was unliquidated, being uncertain, and sounding in damages, it was proper for a jury to ascertain it ; there being nothing for a court of equity to found a determination on. That though this case was within the mercantile law, yet being admitted by the answer, that the charge was for tackling, &c. a court of equity must grant them redress, as a court of admiralty would, (*viz.*) upon the bottom of the ship, and that it would be very hard to send them back again, there to obtain relief ; and that all the part-owners ought to make satisfaction, having received the profit of the voyage, which the ship was enabled to perform by the plaintiff's furnishing the tackle, &c. Baron *Hale* said, In the present case, the proceedings in this court were very proper, and they might go on ; for in the court of admiralty seamen's wages are recoverable, and they are likewise chargeable upon the bottom of the ship ; and yet chancery retains bills for them.

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And Sir *John Trevor*, late master of the rolls, used to say, That a court of equity had a concurrent jurisdiction with them. *Gilb.* 227, 228. *Barn.* 278, 279.

2. See rule, *In things of election the party is to shew that he hath made it. Division, either at law or in equity, ca. 7.*

76. *Dies dominicus non est juridicus.*

1. **T**HE *Sabbath* day is no day for law causes. Upon a fine levied with proclamations according to the statute 4 *H. 7. cap. 24.* if any of the proclamations be made on the lord's day, all the proclamations are erroneous; for the justices may not sit on that day; but it is a day excepted from such business by the common law, for the solemnity of it; to the intent that all people may apply themselves to prayer and serving of God. *Fi. Law Engl.* 7.

2. No plea shall be holden *Quindena Paschae*, because it is always the *Sabbath*; but it shall be *Craftimo quindenae Paschae*. *Fitzh. Nat. Brev.* 17. (F.)

3. If a writ of *Sci. Fa.* out of the common pleas bear teste upon a *Sunday*, it is error; because that it is not *Dies juridicus in banco.* *Dy.* 168.

4. No sale on a *Sunday* shall be said a sale in market overt, to alter the property. 12 *E. 4.* 8.

5. But on a *Sunday* a constable may serve a warrant to find sureties for good behaviour. *Sty.* 250. See *Stat. 29 Car. 2. cap. 7. sect. 6.*

77. *Deficiente uno non potest esse haeres.*

IT is the blood which is between every heir and his ancestor, that makes him heir; for without blood he may not inherit; and therefore he, who hath the full and intire blood, shall inherit before another, who hath but part of the blood of the ancestor; for *ordine naturae totum praefertur unicuique parti.* And therefore *Bracton* saith, *Quod propter jus sanguinis duplicatum, tam ex parte patris, quam ex parte matris, dicitur haeres propinquior soror, quam frater de alia uxore.* And *Britton* saith, That right of blood in this case, makes the female to foreclose the male. The heir ought to have in him two bloods, the blood of the father and the blood of the mother; these bloods commix'd in him by lawful marriage, constitutes and makes him heir; so that none may be heir to any unless he hath in him both the bloods of him to whom he maketh himself heir; and therefore the heir of the half blood shall not inherit, because he wants one of the bloods which should make him heir, &c. *Deficiente uno non potest esse haeres.* And upon this reason, according to *Britton cap. 5.* If a man be attaint of felony by judgment, his heirs begotten after are foreclosed all succession, as well of the part of the mother as of the father; as they born afterwards had not two bloods inheritable in them; because at the time of their generation, the blood of the father was corrupted; for *ex leproso parente leprosus generatur filius*; and when the father is attainted of felony, his inheritable blood is corrupt; and so his son hath but an half blood; that is, the blood of the mother uncorrupt; and therefore having but one blood, he may not inherit even to her, &c. 3 *Co.* 41. a. b.

78. *Dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensata.*

1. *Dispensatio est relaxatio juris*, and permits that to be done, which the law before had prohibited or forbidden. 21 H. 8. 6. a. Dav. 69. a.

2. Dispensations, say the canonists, *Non debent trahi ad communem legem.* Da. 81. a.

3. *Dispensatio est provida relaxatio mali prohibiti, utilitate vel necessitate pensata.* Pal. 476.

4. The intention ought to be regarded, and not the precise words, in the king's grants. Pal. 476. 9 Co. The earl of Salop's case. A dispensation takes away and prevents the offence, whilst a pardon only takes away the punishment. Palm. 476.

5. It is safe and good policy in the king's licences to *Mortmain*, to have *non obstantes* of the statutes of *Mortmain*, and not only of the statute of *Quia emptores terrarum*; but it appeareth by *Littleton*, that there needeth not any *non obstante* of the statutes of *Mortmain*, for the king shall not be intended to be misconusant of the law. And when he licenceth in *Mortmain*, he need not make any *non obstante*; for it is apparent to be granted in *Mortmain*, and the king is the head of the law; and therefore *praesumitur rex habere omnia jura*, &c. in *scrinio pectoris sui*, for maintaining his grants to be good according to law. Co. Lit. 99. a.

6. As to dispensations for pluralities, unless in cases of absolute necessity, they must needs be allowed to be odious both to God and all good men; and therefore by no means intitled to have any favour, extended to their support, but on the contrary, as my lord Gilbert wisely and piously says, No construction can be too liberal to make parsons reside, &c. *Dispensatio est vulnus quod vulnerat jus commune.* And all abuses shall be removed, as said a certain canonist, *si duo tantum verba*, (viz.) *non obstante, non impedirent*, were removed. Da. 69. *Vide et nota tout le casé avec les citations.* It is said a bishop shall be but *unius uxoris vir*, that is according to the exposition of the canonists, that he shall have but one cure; for as they hold by *commendams*, *bigamia contrahitur in ecclesia*; and so it was a primitive bishop said when another benefice was offered him in *commendam*, *absit ut cum sponsa habeam concubinam.* Da. 75. Which shews what were the sentiments of the primitive christians in this matter. And it is to be observed *Marfil. Pat.* pronounced a curse against the court of Rome, where they were invented, for introducing them: and indeed they have been of most dangerous consequence to all the commonwealths in *Christendom*, as may be collected from my lord Coke in his 7 Rep. 36. and Dav. 69. and other the best authorities. For as saith the canonists, *Commenda est materia odiosa et restringibilis.* Pal. 460. 1 Ju. Eccl. the evils of dispensation.

79. *Distinguenda*

79. *Distinguenda sunt tempora.*

THE statute 23 H. 8. was made for the taking away such superstitious uses, as praying for souls supposed to be in purgatory, and such like; not to suppress the erecting of grammar schools, and maintenance of the poor, &c. Before the making this statute divers superstitions and errors in the christian religion, which had a pretence and semblance to charity and devotion, were discovered by the light of God's word; and these only, and not good and pious uses, were intended to be tolled by the statute; for no time was ever so barbarous as to take away education and science, or supporting the poor, &c. but by this and all other the statutes, such uses are intended to be maintained, &c. *Distinguenda sunt tempora.* 1 Co. Porter's case.

80. *Dolus versatur in universalibus.*

19 E. 3. Where the king grants a licence to appropriate an advowson generally, without any recital, this shall not extend to appropriate an advowson held *in capite*, because the grant is general, *Et dolus versatur in universalibus.* Mo. 321. See next rule.

81. *Dona clandestina sunt semper suspiciosa.*

1. **I**N an information against *Twyne*, in *Camera stellat'*, for contriving and publishing a fraudulent gift of goods; the case was upon the stat. 13 Eliz. cap. 5. and was this, *Pierce* was indebted to *Twyne* in 400*l.* and also to *C.* in 200*l.* *C.* brought debt against *Pierce*, and pending the writ, *Pierce* being possessed of goods to the value of 300*l.* secretly made a general gift, by deed, of all his goods and chattels, real and personal whatsoever to *Twyne*, in satisfaction of his debt, but still *Pierce* continued in the possession of the said goods, and some he sold, and the sheep he sheared and marked with his own mark. *C.* had judgment against *Pierce*, and a *Fi. Fa.* to the sheriff, who coming to make execution on the said goods, several persons with force, by *Twyne's* command, resisted the sheriff, claiming them to be *Twyne's* goods, by virtue of the said gift, made on good and lawful consideration. Resolved, The gift fraudulent and within the statute. In this case it was resolved, 1st, That the gift had the signs and marks of fraud. 2dly, Because the gift is general *sans* exception of his apparel or other necessities, for it is commonly said *Quod dolus versatur in generalibus.* 3dly, The donor continued in possession, and used the goods as owner, and traded with others therewith, and deceived and defrauded such persons as he dealt with. 4thly, It was made in secret, *Et dona clandestina sunt semper suspiciosa.* 5thly, It was done pending the writ. 6thly, There was a trust between the parties, for the donor continued the possession, and used the goods as his own proper goods; and fraud is always apparelled and clad with trust, and trust is the cover of fraud. 7thly, The deed said that the gift was made honestly, truly and *bona fide*; *Et clausulae inconsuetae semper inducunt suspicionem.* 2. It was resolved, though there was such debt due to *Twyne*, and so a good consideration of the gift, yet it was not

not within the proviso of the said act; for though it be a good consideration, yet it was not *bona fide*; for. no gift shall be said *bona fide* within the said proviso, that is accompanied or coupled with any trust; for the proviso says, good consideration and *bona fide*; so that good consideration will not do, if it be not also *bona fide*. And therefore when a gift is in satisfaction of a debt, it must be, 1st, In a public manner, for secrecy is a badge of fraud. 2dly, The goods ought to be appraised to the true value, and the deed to express in particular, that it is in satisfaction of a true debt. 3dly, Presently after the gift the donee ought to take possession; for continuance of possession in the donor is a mark of trust, and every trust is out of the said proviso; for a trust between the donor and donee is in truth a fraud to other creditors, for thereby they are defeated of their just debts. A good consideration within the proviso, is a valuable one, and a gift made *bona fide*, is without any trust either expressed or implied; so that such gifts must be both on good consideration and *bona fide*: all statutes made against fraud, are to be construed liberally, and expounded beneficially to suppress fraud, &c. *Twyne* was convicted of fraud, and he and all the others of riot. 3 Co. 80. *Twyne's case*.

2. If lessee for years assign his term by fraud to defeat an execution, and the assignee assigneth *bona fide*, in the hands of the second assignee, it is not liable to the execution. If a man who hath goods to the value of 30*l.* be indebted to one in 20*l.* and to another in 10*l.* and the debtor assigns to him to whom he owes 10*l.* all his said goods worth 30*l.* with intent, that for the rest above the 10*l.* he should be favourable to him, it is void, as it is fraudulent. But *Foster* said it should not be void for the whole, but only for the surplage, as *Twyne's case*. *Quære* saith *Godb.* 161.

3. Instances of concealment are evidences of fraud. *Barn.* 4.

82. *Donatio principis intelligitur sine praejudicio tertii.*

1. THE prerogative of the king shall do no wrong to a subject. *Da.* 75. a.

2. Though the king may dispense with a statute prohibiting a matter indifferent to be done, yet he cannot change the common law by his patent. 37 H. 8. *Bro. Pat.* 100. 6 H. 7. 4. *Dav.* 75. b.

3. Though the grant of the crown be *ex gratia speciali, certa scientia, et mero motu*, yet this shall not extend the grant beyond the intention and meaning expressed in such grant, &c. neither may the crown make a grant by *non obstante* against the common law. So the king may not grant a protection in a *Quære impedit* or assize with a *non obstante* of any law to the contrary, for the mischief that might follow to the plaintiff, &c. 4 Co. *Bozoun's case*.

4. The king may not dispense with the common law with a *non obstante*. *Dav.* 75. b.

5. The king may not grant to a man to be his own judge. *Da.* 75. a.

6. The king may not grant a *commendam* to the prejudice of a lay patron. *Da. Le case de commenda.*

7. The king may not dispense with any to do a nuisance in the highway. *Dav.* 75. a.

8. The king may not grant that if a man trespass upon me, I shall not have an action against him. *Dav. 75. a.*

83. Dower favoured.

General,

1. **U**PON a possession in law, a woman shall be endowed; and yet no man shall be tenant *per le curtesy* of lands, without his wife have possession in deed. *Doct. & Stud. lib. 2. cap. 15.*

2. And where a woman is dowable by act or rule in law, equity shall not bar her to claim her dower. *Cro. Car. 190, 191.*

3. A woman shall be endowed of the best of her husband's possessions. As if the husband held of *J. S.* by *3 d.* who held over of another by *20 d.* and *J. S.* release to the husband, so that he now holds by *20 d.* the wife being endowed, shall hold only by the third part of the *3 d.* and not by the third part of the *20 d.* *Fitzh. Dower 131.*

Particular cases.

4. *J. S.* seized in fee, bargains and sells to the husband for *120 l.* in consideration that he demise to him and his wife for their lives, rendering a pepper corn rent, and with condition that if he paid the money at the end of 20 years, the bargain and sale should be void; he redemisseth accordingly, and dies: the wife brings dower. Though *Croke* and *Jones*, to whom it stood referred out of chancery, conceived it against equity, and the agreement of the husband at the time of the purchase, that she should have it against the lessee; for it was intended that they should have it immediately redemisseth to them, as soon as they parted with it; and it is but in the nature of a mortgage. And upon a mortgage, if the lands be redeemed, the wife of the mortgagee shall not have dower. And if a husband take a fine *sur cognizance de droit come ceo*, and renders *arrere*, although it was once the husband's, the wife shall not have dower; for it is in him, and out of him *quasi uno flatu*, and by one and the same act: yet in this case the judges conceived, that by the law she was to have dower; for by the bargain and sale the land was vested in the husband, and thereby his wife intitled to dower; and when he redemisseth it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not join another with the bargainee, as is the antient course in mortgages. And when she is dowable by the act or rule of law, a court of equity shall not bar her to claim her dower, for it is against the rule of law; and where no fraud or covin is, a court of equity will not relieve. Upon a conference with other justices at *Serjeants-Inn* upon this question, who were of the same judgment, *Jones* and *Croke* justices certified their opinion to the court of chancery, that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof. *Cro. Ca. 190, 191. Show. Parl. Ca. 72. S. C. cited.*

5. If the lands of *J. S.* are sequestred for a personal duty, and he marries and dies, though the lands were sequestred before marriage, yet the wife's right of dower will attach upon them; for this sequestration shall not so far bind or cover them, as to hinder the wife of her dower. *1 Vern. 118.*

6. If a man devise certain lands, money, goods, &c. in lieu and satisfaction of dower, the wife cannot have both: but she may waive the devise and claim dower, or take the devise in lieu of dower, at her election. 2 Chan. Ca. 24. See 1 Chan. Ca. 181. 1 Vent. 340. 4 Co. 1. Vernon's case.

7. But if the husband deviseth lands to his wife during her widowhood, without naming any consideration, she shall have both; because a will imports a consideration, and may not be averred to be in bar; for there may be no averment *dehors* the will, &c. 4 Co. 1. Vernon's case. Co. Lit. 36. Mo. pl. 103. Cro. Eliz. 128. 3 Co. 27. Dy. 220.

8. L. left legacies out of his personal estate to his wife, and devised her part of his real estate during her widowhood, and gave the residue to trustees for 21 years, for the payment of debts and legacies; the remainder of his whole estate he devised to the plaintiff, who was his godson, and of his name, but a remote relation, for life, &c. though this was not declared in lieu of dower, yet in equity it ought to be so taken; for from the giving away the rest of his estate to other uses, it might be collected and intended from the will, that the testator so intended; and a collateral satisfaction may be a good bar to dower in equity, though not pleadable at law: and decreed that she must either take her dower and waive the devise, or take the devise and waive her dower. This decree was after reversed by lord keeper Wright. 2 Vern. 365.

9. See Fi. Law 126, 127, 128. Lit. 7. 9 E. 4. 47. and 2 H. 7. 6. Sav. 57. 1 E. 6. 12. (17.) Fitz. Abr. 306. a. 309. b. Reg. 170. a. Bulst. 173. Noy 108. 2 Leon. 10. Eq. Abr. 208. Lit. chap. Dower. Co. Lit. Palm. 18, 78. Ridl. View, &c. 80, 81. 1 Chan. Rep. 254. Perk. 349. 1 Co. 123. 4 Co. 1. Vernon's case. Doct. & Stud. lib. 2. cap. 22. Dy. 11. 2 Vern. 436, 404. Gilb. 229. Prec. Chan. 351.

10. See rule, *Quod ab initio non valet*, &c.

84. *Eadem mens praesumitur regis quae est juris, et quae esse debet, praesertim in dubiis.*

A Lapse is an act and office of trust reposed by law in the ordinary, metropolitan, and lastly in the king (who is *certum et stabilimentum justitiae*); the end of which trust is to provide the church of a rector, in default of the patron; yet as for him and to his behoof; and therefore as he cannot transfer his trust to another, so he cannot divest the thing where-with he is trusted to any other purpose; and therefore though the king or bishop may suffer the church to stand void, (which yet is *culpa*) yet they cannot bind themselves, that they will not fill the church; for that were *injuria et malum in se*; and therefore shall be judged in law, in deceit of the king; for *eadem mens*, &c. The estates and persons of ideots and lunatics are by law intrusted to the king; if therefore the king should grant to one who intrudeth upon the possession of an ideot or lunatic, or takes their persons unlawfully, that he would not meddle with them, but suffer them to do their pleasure, such grants were void, &c. Hob. 154, 155.

85. *Ecclesia Ecclesiae decimasolvere non debet.*

PROhibition, and surmifeth that he was parson, and the defendant was vicar of the same church, and sued him in court Christian for tithes, upon an endowment that the vicar should have the tithes of all the lands within the parish; and alledged, that he pleaded there, that he is parson *impersonae* there; and that the lands, whereof tithes are demanded, are parcel of his glebe; and that they of the spiritual court would not allow of his plea; and held a prohibition lay upon this surmise; for *Ecclesia decimasolvere ecclesiae non debet*. And *Tanfield* said, this matter was lately in question between *Young* and the parson of *Boxley*, and adjudged no tithes should be paid of glebe lands. But *Popham* said, if the vicar be endowed to have all the small tithes within the parish, and the parson make a lease of his glebe land, the lessee shall pay the small tithes arising therefrom to the vicar, and the gross tithes thereof to the lessor; which was agreed *per Curiam*. Cro. Eliz. 479.

86. *Ecclesia est infra aetatem, et in custodia domini regis.*

Michaelmas 23 E. 1. Inter adjudicata coram rege, Hunt' f. 83. in thesaur' scaccar' sic adjudicatur, Quod ecclesia est infra aetatem, et in custodia domini regis, qui tenetur jura et haereditates ejusdem manutenere et defendere. 11 Co. 49. a. b. 33 E. 3. 5 Co. 13. b.

87. *Ecclesiastical courts may not hold plea of matters determinable at law or in equity.*

General.

1. **F**LETA, *Leges autem anglicanas, licet non scriptas, leges appellari non absurdum*. And lord *Hale*, that they have their power by long immemorial use, and no account can be given of the original or beginning of the common law: there are no monuments, much less any clear and certain accounts of the original foundation of the *English* kingdom or state; by whom, and when planted: and therefore, saith his lordship, we cannot possibly know the original of the laws thereof; but this we know, as it is in *Doct. & Stud.* and indeed runs through all the books, they are grounded on, 1. The law of reason. 2. The law of God. 3. General custom or immemorial usage. 4. Principles or maxims, which have been always taken for law, and may not be denied, &c. 5. Particular customs, and 6. Acts of parliament or statutes. And those things which come in abridgment of the common law are not to be favoured in construction, as are the books, and particularly lord *Hobart*. Chancery is a fundamental court as antient as the kingdom. *Hob.* 63. It is a court of state. 1 *Chan. Ca.* 124. It is to judge according to conscience. *Elf. Obs.* 46 to 56. It is the refuge of the poor. *Elf. Obs.* 115. And can do no wrong. 2 *Chan. Ca.* 217. The equity of chancery shall controul the courts of law, and also *a multo fortiori*, the ecclesiastical courts. 1 *Chan. Ca.* 201. Whereas the ecclesiastical laws and courts are only derived from the indulgence of the crown,

crown, and the acceptance of the people, 1 *Ju. Eccl.* 168, 169. and *Jura ecclesiastica sunt limitata*. *Co. Lit.* 96. a. *Salk.* 553. And are such as are allowed by, and must not be against the common law or statutes, or usages of the realm, &c. *Co. Lit.* 344. a. *Ha. Hist. Law* 53. 2 *Inst.* 488. *Hard.* 63. *Dav. Doct. & Stud.* These inferior and subordinate laws were not from the pope, neither from councils, or any his or their authority; but were extracted from antient canons, &c. *Pal.* 458. 5 *Co. De Ju. Regis Eccl.* 9. a. And may be corrected, explained or abrogated by the civil power. 5 *Co. De Ju. Regis Eccl.* 32, 33. *Keil.* 181. They are of no inherent force. *Poph.* 156, 157. *Da.* 72. *Doct. & Stud. lib.* 2. cap. 26. *Vau.* 329. *Seld. of Titbes,* cap. 14. fo. 412, 413, 414. *Ha. Hist. Law* 27, &c. But under the superintendancy, and subject to the controul of the temporal courts, as well chancery as other. And all ordinaries, and others having ecclesiastical jurisdiction, are subordinate officers to the king and his courts at *Westminster*, for the better execution of justice, &c. *Co. Lit.* 344. a. *Doct. & Stud. lib.* 2. cap. 10, 20, 25, 28, 29. 1 *Vent.* 291, 313, 319. *Skow.* 158. *Gilb.* 208. 1 *Pe. Will.* 12. *Hob.* 155, 294. *Fitzb. Abr. Excom.* 21. 5 *Co. De Ju. Regis Eccl.* 15. b. 22. b. 23. b. 27. a. *Co. Lit.* 134. a. *Hob.* 290. 2 *Inst.* 637. 3 *Inst.* 145, 146, 147, 148, 149, 150. 2 *Mod.* 257. *Stat.* 31 E. 3. cap. 4. 3 H. 5. cap. 5. 21 H. 8. cap. 5. 26 H. 8. cap. 15. *Co. Pl. fo.* 116. *Raft. Pl.* 603. 1 *Cro.* 262. 2 *Keb.* 301. *Pal.* 318. *Comb.* 448, 449. 4 *Inst.* 336. 12 *Co.* 72. 2 *Inst.* 94, 647, 653, 657. *Mo.* 781. *Ha. Hist. Law* 41. 1 *Ju. Eccl.* 200 to 233, 252, 340, to the end.

Particular cases.

1. In cases of chattels, debts, lay-fees. *Ro. Abr. Praemunire*, fo. 311, ca. 2. *Hob.* 84. *Ro. Abr.* 301, ca. 11. 308, ca. 20. *Yelv.* 39, 129. *Fitz. Nat. Brev.* 40. L. *Dy.* 151.
2. Though *in ordine ad spiritualia*. *Hob.* 121.
3. Where boundaries of parishes, &c. *Ro. Abr.* 291.
4. Where the matter hath already received a determination at law. *Fitz. Nat. Brev.* 42. C. D. E. *Ro. Abr. Prohibition* 294. ca. 15. 312. ca. 1. 319, O. 3 *Inst.* 122. 1 *Co.* 139.
5. Where suit pending both at law and in the spiritual court at the same time for the same matter. *Fitz. Nat. Brev.* 43. G. H. J.
6. Where the party is sued in the ecclesiastical court for acts done in the temporal courts. *Fitz. Nat. Brev.* 42. F. 12 *Co.* 43. *Ro. Abr. Prohibition*, fo. 303. ca. 3. R. ca. 7.
7. Where the only remedy is in equity. *Ro. Abr. Prohibition* (2.) ca. 1. *Hard.* 96. *Hob.* 365. 2 *Ro.* 285. *Gilb.* 208. 1 *Ju. Eccl.* 534.
8. Where suits at the same time both in equity and the ecclesiastical court. 2 *Chan. Ca.* 85. *Skin.* 287.
9. Where the ecclesiastical courts have not jurisdiction of the whole matter, or cannot give equal relief, &c. *Ro. Abr. Prohibition*, ca. 5. *Pre. Chan.* 137, 546, 547. *Gilb.* 1, 2, 26, 140, 152. 1 *Vent.* 40, 53. 2 *Vern.* 211, 493.
10. Where these petit courts hold plea of matters only cognizable in any inferior temporal court, or other court. *Ro. Abr. Prohibition* 311. ca. 2. 313. ca. 3. 4. 5. 317. (H.) ca. 4. *Hob.* 15, 16. *Ro. Abr. Prohibition*, fo. 318.

fo. 318. ca. 6. Hob. 246. Gilb. 181. Show. Parl. Ca. 51. 4 Mod. 112.

88. Eodem modo quo factum est dissolvitur.

1. **A**N obligation or other matter in writing cannot be discharged by any agreement by word. 19 E. 4. 1. b.

2. All the court held, that of a donative, beginning only by the foundation and erection of the donor, he hath the sole visitation and correction, and the ordinary nothing to do therewith; and as he comes in by him, so he may restore or resign to him, &c. for *Eodem modo quo factum*, &c. Cro. Jac. 63. Relv. 60. Mo. 765. S. C.

3. One makes a voluntary settlement on another, who agrees afterwards to deliver the same up without consideration, this agreement shall bind in equity; for that a voluntary settlement may be surrendered voluntarily. Pre. Chan. 69.

4. Vide Cro. Ja. 516. 2 Ro. 97. H. 5 H. 7. 33. 4 H. 7. 7. b.

89. Eodem modo quo quid constituitur } dissolvitur, eodem modo } destruitur.

1. **S**AID in the principal case, the feme had lost the name of countess by taking of another husband; for thereby all the names or additions she had before are lost; and therefore the writ, which was in the name of countess, shall abate for that reason. 6 Co. 53. b.

2. *Note*; A difference between a baroness and a countess by marriage and descent. If a baroness, &c. by marriage, marry again under nobility, she hath lost her name of dignity; for, in such case *si mulier nobilis nupserit ignobili, definit esse nobilis*; but where she is noble by birth or descent, whomsoever she marries, she still remains noble; for birth-right *est character indelibilis*: but what is got by marriage, by marriage may also be lost; for *eodem modo quo quid constituitur dissolvitur*. 6 Co. 53. b.

3. See 1 Ro. 461. 4 Co. 118. b.

4. See *The last rule*.

90. Eo ligamine quo ligatum est dissolvitur.

1. **S**EE Cro. Ja. 517. Da. 33. b.

2. See *The two last rules*.

91. Equity. Equality is equity.

General.

1. **B**RACON, lib. 1. cap. 3. *Aequitas est rerum convenientia; quae paribus in causis paria jura desiderat, et omnia bene coaequiparat, et dicitur aequitas, quasi aequalitas*, whose nature is, as Finch saith in his law, fo. 20. to amplify, enlarge and add to the letter of the law.

2. *Aequitas est verborum legis directio efficiens, cum una res solummodo legis cavetur verbis, ut omnis alia in aequali genere eisdem caveatur verbis*, and this definition seems to accord with *Bracton's* definition, *Aequitas est rerum convenientia*, &c. *Plow. Com.* 467. a.

3. There are two sorts of *Leges conscientiae*; the one is *Lex conscientiae politicae*, by which the chancellor ordereth matters; in which law of conscience there is respect had unto the laws, customs and statutes of this commonwealth; and the other is, *Lex conscientiae divinae*, for which there is no compulsive relief in this world, but the offender standeth at the judgment of God only: and this in time past was said to be examinable between the offender and the confessor. *Elf. Obs.* 48.

4. *Note*; In antient time, where the matter was against reason, and the party had no remedy at law, the use was to sue for remedy in parliament, and the parliaments were holden on course twice every year; but now, saith lord *Elsmere*, suits are in chancery, and the parliaments are not so often holden. *Vide Rot. Parl.* and *Bro. Parl.* 33. *Elf. Obs.* 47.

5. Equity judgeth *secundum aequum et bonum*. *Hob.* 225.

6. Equity delights in equality. *1 Pe. Will.* 9.

7. Proportion is the most equal and just law, and most consonant to reason. *Hard.* 209.

Particular cases.

1. In the case of *Carpenter and Carpenter*, cited in the principal case, the husband on marriage had given bond to settle particular lands to the use of himself for life; the remainder to the wife for life; the remainder to the issue of that marriage in tail: the husband having after sold part of these very lands; the lord chancellor on rehearing reversed part of the decree, saying the jointress and issue were equal purchasers, and that the loss must be born in proportion: and so in any case where the jointress and issue claim by the same settlement, if there be a prior incumbrance, the jointress must contribute, and bear her proportion, and not lay the whole burthen on the heir. *1 Vern.* 440.

2. *Harris* having a considerable personal estate, and four children, made his will in writing, and gave several legacies to each of his children, and gave his ready money, plate and household stuff to his wife, upon trust and confidence, that she would not dispose thereof, but for the benefit of her children. She makes her will, calling herself her husband's executrix and residuary legatee, and gave several legacies to some of her children, and only 5s. to the plaintiff and her children, and devised all the rest of her estate to her son *Bartholomew*. The bill was brought for a distributory part; the bequest being a void one, and a breach of trust; after long debate, and several precedents, the lord chancellor decreed an equal distribution. *1 Vern.* 66, &c.

3. The bill sets forth, that the plaintiff's wife's father was a citizen of *London*, and that he had not advanced her in his life-time, and demanded her customary part, and prayed an account. The points insisted on were, that the father had given her 400*l.* which was said could not be an advancement, as it was not given her as a marriage portion, but long after marriage, and without any agreement that it should be for a portion, and was a free gift, and a great part at christenings and lyings-in. The other side insisted,

this

this 400*l.* ought to be thrown into hotchpot, if the plaintiff will come in for his wife's customary part or share. But this was denied, and said this was as the case of an heiress having lands in frank-marriage, which must be cast into hotchpot, but not lands conveyed to her by her father or other ancestor: and it was further said, that the father was a great *Chymist*, and had given receipts to the value of 500*l.* to the defendant, who had married the plaintiff's wife's sister, and therefore it was insisted that they ought to be accounted for, as part of the father's personal estate; and to incline the court to think they were of such value, the plaintiff offered to give so much for them. But Mr. Solicitor and Mr. *Keck*, (after lord commissioner of the great seal) said it would be a scandal to the city of *London* to make such receipts and trifles part of a citizen's estate. Lord chancellor: I will not so far countenance these receipts, (which are only pieces of quackery, to cheat the people), as to put any value upon them in chancery; for ought I know, a receipt to make mince-pies, or catch rats, may be as valuable. The plaintiff not consenting to cast into hotchpot the 400*l.* his bill was dismissed. 1 *Vern.* 61, &c.

4. *Hole, Harrison* and *S.* were bound with another in a recognizance to the chamberlain of *London*; the plaintiff *Harrison* was sued thereupon, and paid the whole money, and now sued *Hole*, who was bound with him, for contribution. *Hole, Harrison* and *S.* being all bound, the principal was dead insolvent, and *S.* was run away. The question was, in what proportion the contribution should be, (*viz.*) a third or a moiety? Decreed: a moiety; for *S.* is insolvent. 1 *Chan. Ca.* 246. *Nelf.* 15 and 203. *S. C.* Vide 1 *Vern.* 70, 297, 404, 440.

5. Where there is a specific legacy, the legatee must have his specific legacy intire, though the other legacies fall short; but where there are several money legacies, as 100*l.* to one, 50*l.* to another, &c. though the devisor directs the 100*l.* to be paid first, yet if the others fall short, the legatee of the 100*l.* must abate in proportion. 1 *Vern.* 31.

6. Sir *George Crooke*, having three daughters only, by his will directs that his lands shall descend and come amongst his daughters, in such shares and proportions as his wife by deed in writing should direct. She makes an unequal distribution, giving little to the plaintiff, who brought her bill, insisting that the giving the wife such power, was only to keep her children in obedience. And the plaintiff, having behaved herself dutifully, ought to have an equal share. The defendant pleaded the will, and that the wife having such a power had by deed appointed so much to one daughter and so much to another, and though the deed was with power of revocation, yet it was never revoked. As to the power of revocation, it was only an authority in the wife, and that being once executed, she could not reserve such power to herself. And whether the wife might, or not, make such unequal distribution, the court would not now determine on the plea, but ordered it should stand for an answer, with liberty to except; but declared the circumstances must be very strong, as bribery or corruption, to take away the power given to the wife by the express words of the will. For the plaintiff was cited the case of *Crgrave* and *Perroft*, where a man having two daughters, one by a former, the other by his present wife, gives his estate to his wife, to distribute between his two daughters, as his wife should think fit, and she gave 1000*l.* to her own daughter, and 100*l.* to the other,

and there the court decreed an equal distribution. On the other side was cited *Swetnam* and *Woolaston*, where an estate was given to a man to distribute among his nephews and nieces, so as he should think fit: a bill being brought by one of the nieces, who had nothing appointed her, was dismissed. In the principal case, at another time, the court ordered to be attended with precedents. 1 *Vern.* 355, 356 and 414, 415. Note; *Though no decree appears in this case, yet the court seemed inclined to support the execution of the power.*

7. A man borrows money on mortgage, and after takes more on bond of the same person, he shall not redeem without paying the bond too, tho' there was no mention that the mortgage should stand a security for the bond debt. So if there are two mortgages, and one is defective, he must redeem both or neither. The same if an heir come to redeem where there is both mortgage and bond, he shall not redeem without paying the bond, so he be bound in the bond. 1 *Vern.* 244, 245. See 1 *Ch. Ca.* 97. 2 *Ch. Ca.* 164. *Nelf.* 389. *Gilb.* 105. *Prec. Ch.* 18, 19, 89, 407.

8. Vide 1 *Vern.* 39, 40, 41, 45, 47, 63, 68, 69, 107, 34, 167, 94, 90, 96, 453, 460, 482, 162, 164, 297, 404, 427, 456. 2 *Vern.* 103, 225, 64, 463. 1 *Vern.* 464, 336, 476, 478, 334, 472, 477. 1 *Chan. Ca.* 135, &c. 256, 257, 262, 267, 279, 280, 135, 148, 223, 238, 240, 243, 248. *Nelf.* 15, 203, *S. C.* *Max. Eq. Fi. Ley* 20. 1 *Chan. Ca.* 138, 139, 164, 171, 174, 295. *Wiseman's Civil Law* 18, 19. *Hard.* 209. *Salk.* 426. *Gilb.* 227.

9. See rules, *Equity favours younger children.* *Discovery draws with it relief.*

92. *Equity cannot change things, nor make them act contrary to their essential natures and properties.*

A Court of equity can no more let a man in, to defeat an estate upon a power of revocation, without a due execution of the power, than the common law could let a man in, to defeat an estate upon condition, without performance of the condition; or than a court of equity can let a man in, to defeat a voluntary conveyance, without a power of revocation; for it is all but a condition which must be performed, or no advantage taken of it; and a court of equity may do great things, but they cannot alter things, or make them operate contrary to their essential natures and properties. 3 *Chan. Ca.* 67. See *The last rule.*

93. *Equity favours assent to legacies.*

1. SEE 1 *Vern.* 330. 1 *Chan. Ca.* 269.

2. See rule, *Equity favours seisin.*

94. *Equity favours attornment.*

1. SEE 1 *Chan. Ca.* 269. 1 *Vern.* 330. 2 *Co.* 68.

2. See rule, *Equity favours seisin.*

95. Equity favours livery.

1. **S**EE 1 *Vern.* 330.
2. See rule, *Equity favours seisin.*

96. Equity favours seisin.

1. **A** Rent-sock is granted. Equity will decree seisin, and the rent to be paid to the grantee. 1 *Ro.* 378.
2. Where there is no remedy at law, as in the principal case, equity will grant one; but where there is one, equity will not grant a further one, though that at law be not available: as where an annuity was granted out of a rectory, the glebe was but 40s. *per annum*, and the tithes not being liable to distress, there was no remedy: equity decreed the whole rectory to be liable to the annuity. 1 *Chan. Ca.* 79.
3. An annuity was devised by will, and by the same will lands were devised to an half brother of the devisee of the annuity, this being a rent-sock without seisin, and no power of distress, and the devisee of the land having promised to pay it; the court decreed the devisee of the land to give seisin of the rent to the devisee of the annuity. 1 *Chan. Ca.* 147.
4. The plaintiff, lord of the manor of *Finchley*, pretending himself lord, and seised of rents of the defendants as tenants of the freehold; a trial was directed, and found for the plaintiff; and decreed the tenure and seisin be admitted without further trial. Lord keeper: Tenants use their landlords badly now. 1 *Chan. Ca.* 269. Note; *Attornment, seisin, assent to legacies, &c.* are favoured in equity.
5. See 1 *Chan. Ca.* 185, 269, 273. 1 *Vern.* 330. 1 *Ro.* 375. *Mo.* 805.

97. Equity favours republication of wills.

1. **R**Evocations are favoured for the benefit of the heir. 2 *Mod. Ca.* 71, 77.
2. Yet a revocation is not to be intended, no more than the disinherison of the heir. *Idem* 73.
3. The making a codicil, and annexing it to the will, is no republication of the will. *Prec. Chan.* 441. 2 *Vern.* 722, &c.
4. See 1 *Vern.* 330. 2 *Vern.* 722. *Hard.* 374. 1 *Ven.* 341. 2 *Mod.* 313. 3 *Rep. Chan.* 155 to 161. *Prec. Chan.* 439. *Barn.* 191, 192, 229.

98. Equity favours younger children.

1. **L**ANDS were devised to the feme for life, after to be sold by the executor, for younger childrens portions. The executor dies, the feme dies; the younger children prefer their bill against the heir; who demurs, because but an authority in the executor, who is dead. Demurrer over-ruled. 1 *Chan. Ca.* 35.

2. A conveyance, purporting a feoffment, may operate as a covenant to stand seised, though generally a defect in a voluntary conveyance shall not be supplied and made good here: yet if a man voluntarily make a settlement, as a provision for his children, and for their maintenance, such voluntary conveyance shall be supplied and made good here. 1 Vern. 40. See Ca. 36.

3. One by will made provision for his younger children out of a copyhold estate, but the surrender was only into the hands of one of the customary tenants; yet decreed for the younger children; so the defect was well supplied against the heir at law; there being many precedents in this court of the like nature. 1 Vern. 132, 133.

4. One having power, by deed or will in writing, to charge lands with 500*l.* devises the same to younger children, but the will was not sealed, yet decreed good against a tenant in tail under the settlement. 1 Chan. Ca. 263.

5. So where one having such power, sends instructions for a conveyance to charge them with younger childrens portions. 1 Chan. Ca. 264.

* 6. A defect in the surrender of a copyhold to the use of a last will was supplied; especially being for the benefit of the devisor's children. See case before the house of lords, *Lloyd versus Barton*, 18 Feb. 1715.

7. Wife being *priviment ensient* at her husband's death, the child could not be provided for by law; but the court ordered the child to have sufficient allowance. Tot. 157.

8. Tenant in tail, with remainder in fee, levies a fine, and settles his estate on trustees. In the first place to pay his eldest son 100*l.* *per annum*, and then to make provision of 100*l.* a-piece for his younger children, to be raised and paid according to their seniority, and maintenance in the mean time. Lord chancellor decreed, that whereas at the time of the settlement the party was a widower and had eight children, and declared he never intended to marry again; yet in regard he afterwards married a second wife and had many children by her, that the children by her were equally intitled with the children by the first. And that whereas the deed directed the provision to be raised and paid according to their seniority, that yet, in case of deficiency, they should be paid in average. That some of the younger children dying in the life of their father, their administrators should not have benefit of this provision, (case 320.) but the same should cease. But in case any of the daughters had been married in the life of the father, and died, the husbands, as their administrators, should have had their portions: and no certain time being appointed, but the same being left indifferent, it doth not naturally attach till the death of the father. And whereas the eldest son had purchased in a statute, which was an incumbrance on the estate, he should be allowed no more than he paid, (see Case 48, 330, 445, 465.) and that the estate must be looked upon as liable, in the first place, to satisfy this incumbrance, and then to raise 100*l.* *per annum* and arrears, and the surplus for raising the provision for younger children, but that their maintenance should go on in the mean time. 1 Vern. 335, 336.

9. One devises a copyhold estate to his grandson; and *Sommers*, lord chancellor, decreed it good, and that equity ought to supply a surrender in this as well as in case of a son; the grandfather being bound to provide for him: but the house of lords reversed this decree; as equity ought not

not to supply such defect in disfavour of the heir at law, unless it was in favour of a son or daughter; and not then neither, if it was to disinherit the eldest son. But it was not material that such son was provided for before, nor how far; for the father only is best judge whether he hath fully advanced his child, or not. *Salk.* 187.

* 10. The executor wastes the fund for younger childrens fortunes; this is a *Devastavit* in him, for which he shall account. But the younger children have no remedy over, out of the real estate; as there was a sufficient personalty, or might have been, had it not been for the executor's wilful neglect. See case *Morgan and Morgan*, before the house of lords, 21 April 1736. *It would be hard to make the corruption or neglect of the executor work to the hurt of the heir, who is an innocent party.* See *Salk.* 155. 1 *Vern.* 336. *Prec. Chan.* 397, 439, 585.

11. *A.* being long in possession of a mortgage in fee, devised it to his daughters *B.* and *C.* and their heirs, and died. *B.* marries, and dies. And on the question, whether the share of *B.* should be deemed a real or personal estate, and so whether it should descend to her heir, or to her husband as administrator? Decreed to the heir. So if a man so seised, deviseth to his son and his heirs, and that they shall go as an inheritance; surely the heir, if this mortgage be paid off, shall receive the money, and not the executor; for he had a governing power, and may dispose of it as an inheritance so long as it may continue so: and the money, when paid off, shall go as he intended the land; but note, this is, when it is in his own family, and when his intent appears plainly by the words of the will; for though it cannot absolutely pass a fee, yet as much as can shall pass. And so it is in all cases where a man has children, &c. *Gilb.* 2. 3.

12. A bill was brought for raising the wife's portion out of a reversionary term, expectant on her father's death. The case was, that *Thomas Maidwell*, the father of the plaintiff's wife, upon his marriage, settled to the use of himself for life; remainder to trustees for 500 years; remainder to the heirs male of his body by his intended wife; and if he should happen to die without issue male of his body by his wife, and there should be one or more daughters of their two bodies, *which should be unmarried, or not provided for at the time of his death*; such daughter, if but one, should have 2000*l.* and 30*l.* *per annum*, issuing out of the profits, till the portion should become due; which was to be paid at eighteen or day of marriage: and a power for trustees to raise it by sale or mortgage of the term, or perception of profits. There was but one daughter, and no son of this marriage. The wife died, the daughter above 21, and married to the plaintiff. The question was, Whether the trustees could raise her portion in the life of her father? And on great consideration, it was held by *Cowper*, lord chancellor, 1st, That though a term is limited in remainder, to commence after the death of the father, yet if the trust is to raise a portion, payable at the age of eighteen, or marriage, the daughter may compel a sale of the term. 2dly, So it is if the trust of a term for raising daughters portions be limited to take effect, in case the father dies without issue male by his wife, and the wife dies without issue male, leaving a daughter, in such case the term is saleable in the life of the father; that so far it had been carried already, but he doubted whether he could have gone so far in case the matter was *res integra*; but that the reasoning, upon which it had been founded, was, that
by

by the death of the mother, the possibility of the issue male was extinct; that all that was contingent in the case has happened: it is become impossible that there should be issue male; and as to the father's death, that is not contingent, for all men must die; and it is now the same thing to say, when the father shall die without issue male by his wife, or to say when the father shall die; and if this case had gone no further, it had been no more than the father is tenant for life; the remainder to trustees for 500 years, for raising daughters portions, payable at the age of eighteen, or marriage: and now all contingencies being happened, and out of the case, it should seem within the reason of the first resolution. That the case of *Graves and Mattison*, 2 Jo. 201. comes fully up to this resolution: Sir *Edward Graves* made a settlement to the use of himself for life; remainder to the use of his first son in tail male; the remainder to trustees for 40 years; remainder to himself in fee. The term is declared to be in trust, in case it should happen that Sir *Edward* should die without issue male of his body, then the trustees should raise 5000*l.* for daughters portions, payable at the age of 21 or marriage, with a provision for maintenance in the mean time; the wife died, leaving two daughters and no issue male. And by *Pemberton, Dolben and Raymond*, it was resolved, That the right to the portion was vested, by the mother's death without issue male, in the life of the father; for otherwise the father might live so long, that the portions might be of little service. Thus far the court has gone for convenience, that young women might have their portions when they most wanted them. But in the principal case, the daughter, who is the subject of the provision, must be a daughter unmarried, or unprovided for at the time of the father's death, which is a contingency not yet happened; and therefore it comes not within the reason of either of the rules. As to the 30*l. per annum* for maintenance, he held, that must be intended in case the father dies without issue male, leaving a daughter under the age of eighteen, or not married; because otherwise this absurdity must follow, that the daughter must be paid maintenance-money in the life of the father, and that out of the profits of a term that is not to commence till after his death. That this case was too strong for the court to attempt to get over, and to do it would create great confusion; and it would be to no purpose for any one to make deeds, if the argument of convenience or inconvenience should prevail to over-rule them. Bill dismissed. *Salk.* 159, 160.

13. Vide 1 *Vern.* 324, 334, 337, 462, 476. 2 *Ven.* 365. *Prec. Ch.* 5, 6. 3 *Chan. Ca.* 13. 1 *Chan. Ca.* 265. 3 *Rep. Chan.* 190.

99. Equity has a concurrent jurisdiction with the admiralty.

1. SEE rules, *Admiralty not to hold plea of matters cognizable at law. Discovery draws with it relief.*

2. See *Salk.* 33. 2 *Ven.* 181. 1 *Ven.* 146, 343. 1 *Lev.* 60. *Raym.* 3. 3 *Mod.* 244. 6 *Mod.* 24, 25, 100, 422. *Stat.* 4 & 5 *Annæ*, cap. 16. sect. 18, 19, 20. 1 *Vern.* 21. *Gilb.* 227, 228.

100. *Equity has a concurrent jurisdiction with the ecclesiastical courts.*

General.

1. **C**Hancery will restrain the jurisdiction of inferior courts, as are all spiritual courts. 1 *Chan. Ca.* 203.
2. Chancery hath an original jurisdiction, or at least a concurrent one with the spiritual courts, *Gilb.* 1. 1 *Ju. Eccl.* 151, 152.
3. Lord keeper declared, that the judges of the ecclesiastical courts were as subject to the equity of chancery, as judgments in the common law courts. *Nels.* 434. 1 *Chan. Ca.* 201. *Gilb.* 208. 1 *Ju. Eccl.* 152.
4. If chancery see the exercise of the jurisdiction of a surrogate be to an infant's prejudice, &c. it is incumbent on chancery to interfere, and take care the infant be not prejudiced, &c. 1 *Ju. Eccl.* 530. *ca.* 8.

Particular cases.

5. The bill was against an administrator & *al.*, for distribution according to the *Stat. 22 Car. 2.* which statute the defendant pleaded, and that thereby the ordinary is made the judge to distribute, and is appointed to take security; and therefore the plaintiff ought to sue there, and not here. Lord chancellor over-ruled the plea. 2 *Chan. Ca.* 95.

6. An infant legatee sueth in a court ecclesiastical, and pending the suit, sueth in chancery: the former suit depending being pleaded, the plea was disallowed; for there is no such security for the infant's advantage as here: and possibly not for interest, if placed out, and for bringing in account here, &c. 2 *Chan. Ca.* 85.

7. The probate of wills did not belong to the spiritual court by the ecclesiastical laws, but came to them by custom and usage: and it is but of late, as *Fairfax* said in *Fitz. Abr.* 148. that they had the probate thereof; and still by usage they are to be proved in *Courts Baron* where such custom prevails. And in this *Fineux* and all the justices agreed 11 *H. 7. 12.* (9 *Rep.* 38.) when the will is proved in the ecclesiastical court, the court has executed its authority (see 2 *Ju. Eccl.* fo. 106. *Havers's case*); but the executors are to sue in the temporal courts to get in the estate of the deceased. So that the several distinctions in our law, touching this jurisdiction, will fall under five heads. 1st, That the spiritual court is the only court now, that has authority to receive the probate of wills, (of personal estates) and to give a sanction to them; because the jurisdiction of the county court (*where they were originally proved*) is lost by non-usage, and since *Magna Charta ca. 18.* the king's courts did not intermeddle. But here must be excepted all courts baron that have such usage for probate of wills. 2dly, The seal of the ecclesiastical courts authenticates the will; and as in *Raym.* 406, 407. the seal of the ordinary in such case regularly cannot be contradicted; because if there be no way in the temporal courts to prove the will relating to chattels, it must go on in the spiritual court, and the determination there must be final; and therefore in such case, if they shew a probate under the hand of the ordinary, the temporal courts cannot receive evidence that the will was forged, or that the testator was *non compos*, or that another person was executor: but

but they may receive evidence, that the seal was forged, or the will repealed, or that there were *bona notabilia*, because that is not in contradiction to the real seal of the court, but admits and avoids it. *Lev.* 235, 236. *Vau.* 207. 1 *Show.* 293. And since the ecclesiastical courts have the probate of wills now, the temporal courts cannot prohibit them in their inquiries, Whether the testator was *non compos*, or not? Or whether revoked, or not? Because these are necessary for authenticating the will. *Hard.* 131, 313. *But these courts and their magistrates, judges and officers are to take with them,* 3dly, That if a temporal matter be pleaded in bar of an ecclesiastical demand, though they may proceed in the ecclesiastical court, yet it must be according to the temporal law, or else the temporal courts will hinder them. *Show.* 158, 173. 1 *Ven.* 291. 3 *Mod.* 283. If the spiritual court admit a will, but will not give the probate to the executor, because he cannot give security for a just administration, a *Mandamus* lieth; for though they are to determine whether or no there be a will or not? Yet if there be a will, the executor has a temporal right, and they cannot put any terms upon him, but what are mentioned in the will; and therefore if they will not grant the probate, where they admit there is an executor, the court will grant a *Mandamus*. 4thly, If a man gives lands to be sold for payment of debts, and disposes of the money to several persons; that cannot be sued for in the ecclesiastical court, but only in a court of equity; because there is not a legacy merely of goods and chattels, but it arises originally out of lands and tenements, and they have a testamentary jurisdiction touching chattels only. *Hob.* 2 *Ro.* 285. 5thly, Courts of equity can hold plea concerning a legacy, and likewise concerning the devise of a *residuum*, which is but a legacy. They may in notorious cases declare a legatee who has obtained a legacy by fraud, to be trustee for another: and as to the devise of a *residuum*, nothing can be more clear, for since the case of *Foster and Munt*, 1 *Vern.* 473. where-ever an executor hath had a specific legacy, he has been looked upon as a trustee of the *residuum* for the relations, in a course of distribution; and no body ever attacked these decrees in favour of the relations, (see 2 *Vern.* 648.) upon this head of argument, that they were contrary to the ecclesiastical jurisdiction. *Gilb.* 203. *Marriot's case*.

8. Nobody ever thought that declaring a trust in any of these cases mentioned above in *Marriot's case*, was an infringement upon the ecclesiastical jurisdiction. *Gilb.* 209.

9. See 1 *Vern.* 26, 93, 90, 27, 134. 1 *Ju. Eccl.* 530. 2 *Ju. Eccl.* 106, &c.

10. See rule, *Discovery draws with it relief*.

101. Equity is to enforce the execution of agreements.

1. **E**QUITY will compel the performance of agreements in specie, as it looks upon articles for a purchase of land, equal to a conveyance; for if the purchaser dieth before any conveyance is executed, and deviseth these lands, they shall pass in equity. 1 *Chan. Ca.* 39. Vide 1 *Vern.* 201, 217, 48. 2 *Vent.* 353. Yet it must be fair. 2 *Chan. Ca.* 17. 1 *Vern.* 227, 167, 271.

2. It

2. It was said in the principal case, that it had been held by some, that even a bargain and sale inrolled by *Cestuy que trust* of an estate-tail, shall bind the issue, in regard that such a trust is not within the statute *De donis*. And it was resolved in the principal case, that a common recovery, or a fine by *Cestuy que trust*, should have the same effect and avail in equity; and bind the trust in the same manner, as the same would have bound the estate in law, in case he had had the legal estate in him. 1 *Vern.* 440.

3. Equity will not relieve against the terms of an agreement, though it may seem in nature of a penalty. *Prec. Chan.* 102.

4. Neither will equity establish an agreement, where founded in fraud. *Prec. Chan.* 538. *Vide* 574. For *aequum et bonum est lex legum*; and the office of equity is to suppress fraud.

5. A. makes a voluntary settlement on B. who after agrees to deliver it up without consideration, yet this agreement shall bind in equity; for a voluntary settlement may be surrendered voluntarily. *Prec. Chan.* 69.

6. A husband had made a provision for his wife, and agreed that her fortune, which was in trustees hands, should be laid out in the purchase of lands; this agreement, though after marriage, was not to be considered as voluntary, so as to be set aside in favour of a creditor of the husband, for on a bill by the husband, the court would not have decreed for him, without a settlement, and the creditor can be in no better or other condition than the husband himself would have been in. *Prec. Chan.* 22.

7. Sealing, not necessary to bring agreements out of the statute. *Prec. Chan.* 16, 560.

8. The agreement is by parol only, yet the defendant confessing it by his answer, without insisting on the benefit of the statute, equity will decree execution; because there is no danger of perjury. *Prec. Chan.* 208, 374. 2 *Chan. Ca.* 136, 143, 164. *Nels.* 343. *Gilb.* 437.

9. Agreement, though not in writing, being executed on one part, and enjoyment had under it; equity will not destroy it. *Prec. Chan.* 519. *Vide* 533.

10. A settlement was made by the husband on his wife for a jointure, the husband covenanted that the lands were worth 800*l.* a year, and that if the same were short, his other estate should be liable to supply the defect. After, all the other estate of the husband, not in the jointure, was mortgaged, and afterwards he acknowledged a judgment to the plaintiff, who was his taylor, and had been bound with him in several bonds. The judgment was defeazanced on payment of 550*l.* The husband makes his will, and deviseth all his lands for the payment of his debts. The plaintiff brought the bill to have the trust performed and to be paid. The defendant, son of this marriage, in his answer confesseth the devise for payment, but sets forth the indenture, covenant and mortgage; and insisted they were prior, and ought to be first paid; and cited a case where a man covenanted to make a jointure of 500*l.* a year, mentioning no lands, and there the lands were bound even against a purchaser. Mr. Keck admitted that to be so. But where particular lands are settled, and the husband covenants they are of such value, it binds the person only: but this case indeed was stronger, for he had made his other lands liable to the defect of the jointure in value. Mr. Keck also admitted, that where lands are generally devised for payment of debts, there all sorts of securities, whether statutes, judgments, bonds or simple contracts,

contracts, shall be paid in average. But then there is this difference, that if the devisee and trustee to pay debts, be also executor, then the lands so devised becomes legal assets, and the debts must be paid according to their precedence or superiority at common law. And so it was resolved in the case of *Hixine and Mortley*, which was agreed to be law on all sides; and this case being so, it was agreed that the lands should be sold according to the trust in the will, for payment of debts. And that the plaintiff be let in for satisfaction of his judgment, which had slept 40 years. 1 *Vern.* 63, &c.

11. See *Salk.* sub tit. *Chancery, Duke Hamilton and Lord Mohun's case*, 2 *Vern.* 201, 202, 423. 1 *Chan. Ca.* 84, 68, 172, 236, 238, 243, 274, 212. *Nelf.* 67, 68, 72, 128, 138, 164, 144, 167, 170, 119, &c. *Gilb.* 71. *Prec. Chan.* 89, 102. *Nelf.* 180, 183, 190, 201, 224, 230, 231, 235, 254, 261, 262, 326, 343, 374. *Gilb.* 11, 13, 14, 15, 108, 109. *Vue le Livre* 141, 143, 160, 188. *Contra Prec. Chan.* 175, 186. *Gilb.* 152. 2 *Vern.* 386, 498, 671, 752. 1 *Vern.* 53, 326. 1 *Rep. Ch.* 4, 164. 1 *Chan. Ca.* 250. *Prec. Ch.* 456, 497, 239. *Gilb.* 160, 167. 2 *Vern.* 379. *Prec. Ch.* 16, 17, 19, 20, 25, 26, 29, 30, 69, 70, 538, 560, 575. *Gilb.* 64. 1 *Pe. Will.* 61, 104, 105, 106. *Prec. Chan.* 462. *Eq. Abr.* 218. 2 *Vern.* 373. 1 *Chan. Ca.* 39, 173, 208. 2 *Chan. Ca.* 63, 78. *Vern.* 13. 1 *Chan. Ca.* 49. 2 *Vent.* 350. 1 *Chan. Ca.* 236.

102. *Equity has a power, upon circumstances, to relieve against penalties, judgments and executions, and to abate, moderate, and sometimes discharge damages and costs.*

1. **T**HE mortgagee had obtained judgment in ejectment, and entered on the premises, and thereby prevented the creditors, who had subsequent securities, from entering; and suffered the mortgagor to take the profits. And now the other creditors coming to redeem, it was ordered that the mortgagee should be charged with all the profits he had or might have received from the time of his entry. 1 *Vern.* 270.

2. If the lessor will avoid the lease for non-payment of rent at the day, equity will relieve against such forfeiture. *Cor.* 45.

3. The plaintiff, tenant for life by copy *durante viduitate*, felled trees, which was presented and found by the homage; and so a forfeiture. A bill was brought for relief against the forfeiture, offering, if it appeared it was so, to make satisfaction. Issue directed to find whether the primary intention in felling the timber was to do waste; declaring in case of wilful forfeiture, this court would not relieve. 1 *Chan. Ca.* 96. see 95. Admission by the lord, dispenseth with a former forfeiture. The father committed a forfeiture, the lord nevertheless seised an heriot upon his death, and yet would avoid the heir's estate for that forfeiture, which he could not, because the taking of an heriot alloweth a dying seised. *Tot.* 107. Yet where the father commits a forfeiture, and dieth, and the son is admitted as heir by descent, it was decreed that this purgeth not the forfeiture; because the father dying seised of no estate, the son can be admitted to none. *Tot.* 107. *Ideo quaere.*

103. *Equity is a creature of chancery, and as such to be governed as conscience directs by that court.*

THough the lord keeper was not positive in the main point, yet he said as to the agreement by the father, whether to be avoided by the son, now defendant, that in case the land had been intailed *de facto*, and agreed, no agreement could bind the issue without fine or recovery, or other legal bar: yet he said the agreement to intail was not an intail, and though it raised an equity against him that made it, yet that equity is a creature of this court, to be governed as conscience directs by this court; and said that the statute *De donis* was an ambitious act in favour of lords against the king, and for that vouched the lord *Elsmere*; but before he said this, there were some proposals of agreement. And at length the case was composed.
1 *Chan. Ca.* 236.

104. *Equity is part of the law of England.*

1. **E**QUITY is part of the law of the land. 1 *Chan. Ca.* 141.
2. *Plow. Com.* Easton's case, *Elf. Obs.* *Bract. lib. 1. cap. 3.*
Finch's Law and West's Prec. Doct. & Stud. See next rule.

105. *Equity is to moderate the rigour of the law.*

1. **E**QUITY is that which is called equal and good, and sometimes equal and just, and mitigates or moderates the law written in some circumstances; and as law is that which maketh all things streight, so equity is that which dispenseth with many points of the law, measuring out to every man that that is his. It is a reasonable measure, containing in itself a fit proportion, suitable to the persons, matters, places, times and other circumstances. And it differeth from law, as law is a determinate sentence: but equity is a certain proportion and allay on good and just occasions, setting aside the common rules of law, and is therefore sometimes called a ruled kind of justice, allayed with the sweetness of mercy. Sometimes plain dealing is called equity, which is opposite to the dealing of man by nice points of law, &c. 2 *West's Prec.* 174. b. 175. b. 176. a.

2. Equity is two fold, 1st, Written, and 2dly, Not written. 1st, Written where the case in all points is answerable to the law without any different circumstances requiring any change or alteration of the law. 2dly, Unwritten where particular facts fall out which have no certain line or square set out for them in the law already made; so that they must be decided according to their circumstances, yet as near as may be to the principles of law. And herein is the greatest use of equity; and therefore it is most fitly called an unwritten equity, not because the judges thereof are at liberty to define and determine of it, without regard to the law written; but because it taketh a just liberty not to bind itself to the general rules of the law, but to determine according to the particular circumstances of the case.
2 *West's Prec.* 175. a.

3. Strict

3. Strict law is severe and not to be moved, it taketh order for things once for all: and its grounds and principles are universal, from which it will not turn; whereas equity particularly and carefully examineth the causes, times, persons and matters, with all and every of their differences, together with all the other circumstances, and on all these gathered together, frameth an absolute and perfect decision. *St. Germain* to the like effect saith, equity is a righteousness tempered with mercy, which considereth all the particular circumstances of the deed. *Doct. & Stud. lib. 1. cap. 16. 2 West's Prec. 175, 176.*

4. It is discretionary in equity, whether to interpose, or not, where there is no remedy at law; as in cases of voluntary conveyances and the like. *Prec. Chan. 84. Yet I conceive where there would be a failure of justice, equity, by the rules of conscience, which are the guides of equity, is bound to interpose and supply the defects of the law, as are the books, unless in particular cases where equity is forbid on account of some general inconvenience.*

5. God is the efficient cause of equity. And the law of nature, the law of nations, and good manners, are the material causes thereof; the formal cause thereof, is the squaring the circumstances of facts with the rules of law. And the final cause is to keep an equality amongst men. *2 West's Prec. 175. a. b.*

6. And there is a difference between equity and clemency; equity being always firmly tied to the will of the law, whither soever it inclineth, whether to clemency or severity; but clemency is only proper for the prince, or those magistrates that have the like power of administration of justice as princes have. *2 West's Prec. 175. b.*

7. See 3 *Chan. Ca. 73, 134. Prec. Chan. 46, 47, 233, 236. Nelf. 417.*

106. Equity looks upon that as done which ought to be done.

*1. **A**LL agreements are to be considered as performed, which are made on valuable considerations; and they are also to be considered as done at the time when, according to the tenor thereof, they ought to have been performed; and they are also deemed to have the same consequences; in regard that the person, or any other claiming authority under him, ought not to benefit by his own laches or default, nor those for whose profit such contract was made to suffer thereby. See case *Frederick versus Frederick*, before the house of lords, 4 May 1731. And therefore

2. If a purchaser dieth before any conveyance of the purchased lands executed, having devised the same, they shall pass in equity; for equity looks upon articles for a purchase equal to a conveyance. *1 Chan. Ca. 93.*

3. So a bill was brought to compel the performance of a parol agreement for a lease of an house, in confidence of which agreement the plaintiff had laid out a considerable sum of money. The defendant pleaded the statute of frauds, and his plea was allowed. But the lord keeper was of opinion, if the bill had charged it was part of the agreement, that the agreement should have been put into writing, that would have altered the case, and possibly have required an answer. *1 Vern. 151.*

*4. Tenant for life with power to make leases for 21 years, so the same be in possession, and at the best improved rent, makes a lease, and a year after

after gives a note to another of his tenants under his hand, that he will renew his and the other tenants lease so often as he shall be required. Decreed to renew at the old rent for 21 years, if he shall so long live: this decree was pronounced by the court of exchequer in *Ireland* 21 Feb. 1736. * and affirmed by the house of lords here 7 April 1738. See also *Obara and Oneil*, 12 Feb. 1717, both cases before the house of lords.

* 5. Yet a written agreement being unreasonable, equity would not carry it into execution, but decreed it to be delivered to the party for whose benefit it was designed, that he might make the most of it at law. See case before the house of lords, *Squire and Baker*, 27 Feb. 1726, also * *White and Leighbourn's* case, 28 Feb. 1722. * *Green and Green*, 25 Jan. 1710. * *Thompson and Harcourt*, 13 Feb. 1721. * *Moody and Stewart*, 28 Feb. 1728. all before the house of lords.

6. And where an equal agreement cannot, by reason of any subsequent act of parliament or the like, be performed in the whole; yet the same shall be executed in such part as is lawful, as was the case of * *Doctor Betsworth, & al' of Doctors Commons against The Dean and Chapter of St. Paul's*, before the house of lords, 2 May 1728, also case * *Bridge and Hitchcock*, before the house of lords, 24 June 1716.

* 7. And in matters executory, as in case of articles directing a conveyance, where the words of the articles are either improper or informal, equity will direct a conveyance, not according to such improper or informal expressions, but in a proper and legal way, so at least as to answer the intent of the parties. *A fortiori* in the case of a will. See case before the house of lords, * *The earl of Stafford and Hobart*, Anno 1709. And equity will carry marriage articles into strict execution. See case before the house of lords, 5 Feb. 1719, *Trevor and Trevor*, and also case * *Martin and Martin*, 6 March 1726, and *Gleg and Gleg*, 14 May 1728. * ——— and *Stanley*, 5 March 1714. * *West and Erisley*, Feb. 1727. * *Vernon and Vernon*, 23 March 1731-2. * *Onesby and Dodswel*, 21 Jan. 1702. * *Pocklington and Sir Compton Donswile*, Feb. 1729. * *Blake and Blake*, May 1729. * *Newgent and Newgent*, 6 Feb. 1737.

8. See rules, *Equality is equity. Equity favours younger children. Equity is to execute the intent of the parties. Equity rectifies mistakes. Equity is to enforce the execution of agreements.*

9. See also 2 *Chan. Ca.* 91. 2 *Vern.* 295, 296. *Gilb.* 165.

107. *Equity may carry the debt beyond the penalty on circumstances.*

General.

1. **W**HERE security is taken by penalty, the penalty cannot be exceeded, nor so much taken if compensation may be without it. 1 *Ch. Ca.* 24.

2. On a bond to perform covenants, the party shall recover no more than he is really damnified, and should recover on a trial at law. 1 *Rep. Chan.* 197, &c.

3. No relief beyond the penalty of a recognizance for the performance of covenants. 1 *Rep. Chan.* 94, 95.

Particular cases.

4. Lord *Belmont*, anno 1647, being under great oppressions from the then usurped powers, and going abroad, lent 600*l.* to *G.* on a recognizance of 1000*l.* which he took in the name of the defendant *Busb.* and intended as a provision for his infant daughter then but two years old. *B.* at the same time executed a declaration of trust, and covenanted that the now plaintiff the infant should enjoy. Lord *Belmont* died in *Persia*, anno 1654, *G.* sells his estate, and *B.* acknowledges satisfaction; and in 1657, and not sooner, the plaintiff had knowledge of this trust and the breach of it, and then brought her bill for relief. The defendant by his answer, insists that he was but 18 when he executed the declaration, and the declaration, tho' made for the infant, was indeed to protect the father's estate, and that he never had the custody of the recognizance, nor any consideration for acknowledging satisfaction, but the lord *Belmont's* widow delivered up the same, and believes received the money due on the same, and whereupon he acknowledged satisfaction, and believes he had some warrant for so doing, but that the same was burnt in the fire of *London*. And further, that after all this time of 30 years he ought not to be charged with this pretended breach of trust: and his counsel insisted further, that the plaintiff ought to prove some fraud in the trustee, or that he received the money to his own use. Lord chancellor: It lies on the defendant, who ought to discharge himself. There is no doubt but an infant may be a trustee, and the breach was after he was of age; and therefore decreed him to pay principal, with damages not exceeding 1000*l.* being the penalty; and cited *Hob.* where *Cestuy que trust*, in an action on the case against his trustee, shall recover for breach of trust in damages. 1 *Vern.* 342, &c.

5. Anno 1638. those under whom the plaintiff claims a debt of 1300*l.* acknowledged a judgment for 2000*l.* but the penalty was defeazanced on payment of principal and interest. The defendant for 10 or 12 years kept the plaintiff out of his debt by fencing with prior incumbrances, which in truth, were satisfied, and by a pretended intail, which on trial at law were found against him. The plaintiff had exhibited a former bill, and only prayed the defendant might come to account, what, if any thing, was due to him on those prior incumbrances, and that the plaintiff might be satisfied his debt; but did not pray further, as he might, that if the defendant should be found to have received more than his due, that he might pay the overplus to the plaintiff. Upon the account it was found that the defendant was over paid 400*l.* and the plaintiff's now bill was for this money towards his debt, and to be satisfied his principal, interest and costs. The defendant pleaded the former bill and proceedings, and that after account here, the plaintiff had proceeded at law, and revived his judgment by *Sci' Fa'*, and taken execution by *Elegit*, and that thereupon the defendant had brought the whole penalty of the bond into the common pleas, and insisted that equity ought not to charge him beyond the penalty. The plea was allowed. Yet equity does sometimes carry on the debt beyond the penalty. As where the party had been delayed by the injunction of this court; but then it has always been against the plaintiff, and never known the plaintiff hath charged the defendant further than he could at law. The plea was principally allowed, because the plaintiff had, after account, surceased his

prosecution in this court, and proceeded at law; and therefore having elected to proceed at law, he should not now resort back to equity. 1 *Vern.* 349, 350. *Show. Parl. Ca.* 15, 16.

6. The case was upon an appeal to the house of lords for relief against a decree in chancery. The appellant *Elizabeth* had executed a bond of 140*l.* penalty, conditioned for the payment of 72*l.* 20 *April* 1676. And by means of several promises and delays in payment, and privileges and other occasions intervening, this bond was not sued till lately, when *Solvitur ad diem* was pleaded, and after issue joined and notice of trial, upon some discovery of defect of evidence to prove the bond, it was moved to alter the plea, which being denied, a bill was brought in chancery, on suggestion that the appellant had never executed the bond, or that it was gained by fraud, and was without consideration. The respondent on the other hand preferred a bill for discovery of such bond, &c. and on hearing it was decreed, That the appellant should not be relieved only against the penalty; and referred to a master to compute the principal and interest due thereon, and to tax costs for the respondent both at law and in equity; and that what the master shall find due, be paid as the master should appoint; who computed the principal and interest at 154*l.* and costs at 67*l.* and appointed payment 20 *October* following. On hearing of the appeal, two *quaeries* were made. 1st, Whether, as there had been some difference concerning the proof of the bond, the court should have decreed without directing an issue at law to try the validity of the bond. But it was held that, as the bond was not denied in pleading at law, chancery had done right, as they could not well have directed any other issue than the parties themselves had joined in at law; and though it was pretended that the attorney had so pleaded without authority, yet the court paid no great regard to that pretence, because of the remedy over, against the attorney, if the fact was really as pretended. Another question was, Whether equity could justly award more than the penalty? That the order being to save against the penalty, no more ought to have been awarded or decreed. But it was said, that notwithstanding that, when the same was referred to a master, to tax principal and interest, the order bound the party to pay both, though it should amount to more than the penalty; and the meaning of the first part was only to relieve against the penalty, in case the money due for principal and interest came to less than the penal sum. And especially as there were cross causes, and as this case was circumstanced, and after such delay, and such pleadings in the king's bench. And as to the costs it was held no cause for appeal, nor in truth, was it ever known to be a cause, if the merits were against the appellant; and so the decree was affirmed throughout. *Show. Parl. Ca.* 15, 16.

7. See *Cary* 1, 2. 1 *Chan. Ca.* 23, 24, 226. 2 *Chan. Ca.* 184, 185, 225. 1 *Vern.* 34, 40. *Salk.* 154. 2 *Rep. Chan.* 88. *Eq. Abr.* 92.

8. See rules, *He who hath done iniquity shall not have equity. He who takes security by a penalty, ought not to have more, nor indeed so much, if compensation for the damages may be made without it, ca. 2. Equity to relieve where the matter lieth in compensation.*

108. *Equity not to relieve, where there is relief, or may be good defence, at law.*

1. **W**HERE there is no remedy at law, equity will grant one; but where there is one, equity will not grant a further remedy, though that at law be not available. 1 *Chan.* 79, 147, 269.

2. Where no fraud or covin is, a court of Equity will not relieve, *Cro. Ca.* 190, 191.

3. Conscience never resisteth the law of man, nor addeth thereto, but where such human law is contrary to the law of reason or of God; in which case it cannot properly be called a law, but corruption. *Doct. & Stud. lib. 2. cap. 15.*

4. The chancery in its absolute power holdeth suit by *subpoena* only of such matters, as are not remediable by the common law. *Per Prisot cap. Jus. in com. Banco, 37 H. 6. 14.* and by *Jenney Apprentic. 39 E. 6. 26. Conscience 6. Elf. Obs. 46.*

5. The chancellor holdeth plea but of matters not remedial by the common law; and that he must judge according to truth, and not upon the default of the party, as the common law doth. *Elf. Obs. 47.*

6. Matters of freehold are not properly determinable in equity, though they have been there determined. (2.) Matters properly determinable at law are not properly relievable in Equity. *Hard. 51.*

7. Vide 1 *Vern. 71, 119. Syd. 109.*

8. See also rule, *Equity favours seisin.*

109. *Equity proper interpreter of statutes.*

1. **L**ORD chancellor said a court of equity was as proper a judge or interpreter of an act of parliament, as a judge at law. 1 *Chan. Ca.* 55, 56, but the chancellor cannot add to a statute, 228.

2. All statutes made against fraud are to be construed liberally, and expounded beneficially to suppress fraud. 3 *Co. Twyne's case.*

3. See 1 *Chan. Ca.* 205, 228. *Co. Lit. 272. a. b. 290. a. 360. a. 365. b. 366. a. 381. b.*

4. See also rule, *Statutes to be construed in equity.*

110. *Equity proper place to relieve legatees.*

1. **A.** Bequeaths a legacy, and makes baron and feme his executors, and dies. The baron after makes his will, and makes the feme and his son executors, and dies. The legatee of *A.* brings a bill against the feme and her son, setting forth the case *ut supra*; and chargeth that the estate of *A.* liable to the payment of the legacy, is all come to the hands of the feme and her son. The son demurred, for that the feme who was the surviving executor of *A.* was only liable to his legacy; and the son being executor of one of *A.*'s executors who died first, leaving an executor of *A.* surviving, was not privy in law. Yet inasmuch as it was charged that the son had gotten the estate of *A.* the demurrer was over-ruled; the court declaring that
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the estate of *A.* in whosoever hands, ought to be liable to his legacies.

1 *Chan. Ca.* 57.

2. See rule, *Equity has a concurrent jurisdiction with the ecclesiastical courts.*

III. Equity is to execute the intent of the parties.

1. **T**HE mistake in the name in a conveyance, being heir male, holpen, and lands to pass according to the intent of the parties. *Tot.* 228.

2. A mortgagee in fee enters for a forfeiture, and enjoys seven years, and then absolutely sells to *J. S.* *Curia*: The estate shall not be looked upon as a mortgage in the hands of *J. S.* so as to make it a part of his personal estate; but it shall be for the benefit of the heir. 1 *Vern.* 271.

3. Lady *Wentworth* having issue by her former husband Sir *John Wentworth* two sons, (*viz.*) *T.* and *J.* settled the lands in question on herself for life; remainder to *John* her said second son and his heirs, he paying to the lady *K.* her daughter, 1500*l.* within six months after the death of the elder brother, in case he died without issue, and if he did not pay the 1500*l.* that then the lands should go to the lady *K.* and her heirs. *T.* is dead *sans* issue, and the lands descended to *J.* an infant, and the land not being worth 1500*l.* he would not redeem. Now lady *K.* being dead without issue, the question was between the earl of *Winchelsea*, administrator of his said daughter lady *K.* and the lady *Elizabeth*, sister and heir of the lady *K.* The lord chancellor, assisted by chief justice *Bedingfield* and chief baron *Atkins*, dismissed the plaintiff's bill, declaring it was not a bare security for money, but a settlement with a plain limitation over on default of payment, and the intention of the party appears, &c. and to make the estate a redeemable estate, would be to destroy the known difference in the law books, between a limitation over and a condition. 1 *Vern.* 402, &c.

4. In all cases a court of equity is to consider what was the real intent of the testator. And they cannot declare a trust according to their own fancy, nor according to what the testator should have willed; for then they, and not the testator, make the will. But they may, according to the real intention of the testator, declare a trust upon such will, though not contained in the will itself: which is in these three cases; 1st, In the case of a fraud upon a legatee. 2dly, Where the words imply a trust for the relations. 3dly, In case of a legatee's promising the testator to stand as a trustee for another. *Gilb.* 209.

5. Vide 1 *Vern.* 110, &c. 201, &c. 138, 159, 222, 267, 457, 298.

2 *Vern.* 201, 71, 77, 244, 245, 363, 432, 433. 1 *Chan. Ca.* 68, 174.

3 *Chan. Ca.* 13, 19, 86.

6. Vide etiam rules, *Equity rectifies mistakes and supplies defects. Equity looks upon that as done which ought to be done, ca. 2. That shall have the benefit which hath or would have sustained the loss.*

112. Equity rectifies mistakes and supplies defects.

General.

1. **M**ISTAKES of a name of a corporation holpen in equity. *Tot.* 228.
2. The mistake of a name in a conveyance, being heir male, holpen, &c. *Tot.* 228.
3. The mistake of the clerk amended by the record. *Tot.* 228.
4. The word *heir*, left out of the clause of a reservation, supplied in equity. *Tot.* 229.

Particular cases.*

5. The plaintiff makes a lease of lands to the defendant, meaning that all woods growing thereupon should be excepted, saving for necessary botes; but by mistake of the clerk, by putting in *hereafter excepted*, where there was no exception afterwards, whereupon the defendant cut down wood, but was ordered to be stay'd. *Tot.* 228, 229.
6. The plaintiff became surety for the defendant to *B.* in 100*l.* bond, and the defendant giving a counter-bond to save the plaintiff harmless of a bond of 200*l.* whereby, by means of this mistake, the counter-bond was void in law, yet relieved here. *Tot.* 229.
7. Misprision in a counter-bond rectified. *Tot.* 229.
8. So concerning the mistaking of a power, made good here. So where misrecited. *Tot.* 229.
9. A lease made by dean and chapter, misreciting the name of their corporation, holpen in chancery. *Max. Eq.* 55. *margin.* See *Tot.* 228.
10. The plaintiff had a bond in *Quadráginta libris* to pay 200*l.* which should have been *Quadríngentis*. The defendant was sued in chancery as heir and executor of the obligor, the obligor having bound himself and his heirs. Plaintiff had relief, &c. 2 *Chan. Ca.* 225.
11. Vide 1 *Chan. Ca.* 267. *Tot.* 131. 1 *Rep. Chan.* 162. 2 *Ro.* 434.

113. Equity regards substance, not ceremony.

1. **L**ANDS were devised to the feme for life, after to be sold by an executor for younger childrens portions; the executor dies; the feme dies; the younger children bring their bill against the heir, who demurred, because but an authority in the executor, which is dead with him; but the demurrer was over-ruled. 1 *Chan. Ca.* 35.
2. A man, after marriage, voluntarily gave bond to settle a jointure, and did it, and the bond was delivered up; after his death the jointure being evicted, it was decreed she should recover her dower; and what that fell short of the jointure she should, being administratrix, retain out of the personal estate. 1 *Vern.* 427.
3. The testator seised in tail of freehold lands, and in fee of copyhold, devised the copyhold to the defendant, who was intitled to the remainder of the freehold, and the freehold he devised to the plaintiff. The defendant, apprehending there had been a recovery by the testator, agreed, without any consideration, with the plaintiff, that each should enjoy according to the
Y will;

will; but after finding there had been no recovery, he brought his action to recover the freehold lands; and the plaintiff his bill to establish the agreement, which was decreed accordingly. 1 *Chan. Ca.* 84.

4. Devise was of lands to the plaintiff and his heirs male, but the testator declared his will to be, that the plaintiff should have no benefit of this devise, unless the plaintiff's father should settle on the plaintiff two full thirds of his estate settled on the said father on his marriage. The father devised all his estate to the plaintiff his son. First for payment of his debts; then to the plaintiff for his life; remainder to his first and other sons in tail. Though by the will he was only tenant for life; whereas by the condition he was to have either fee or fee tail, it being in case of a will. Yet the court conceived it well enough, and answered the testator's intent better, than if the condition had been literally performed; and declared that if the substance of the condition was performed, that should serve the turn. 1 *Vern.* 79.

5. The marriage was to be with the consent of the father under a penalty or forfeiture of the fortune. The father was in treaty for her marriage, and the jointure agreed on, and directions given to draw the writing accordingly. But before assurances were settled, the young couple married without the father's knowledge. Decreed a marriage with his consent; as there was an express assent both before and after the consummation, and the case thus circumstanced, as hath been mentioned, and no disagreement or alteration of the father's good liking in the mean time. 1 *Rep. Chan.*

1. See 1 *Mod.* 310.

* 6. A lease is a sufficient authority to possess by, though the formalities of law are wanting; so that if it happen to be evicted, yet the tenant shall be allowed for what he hath laid out for lasting improvements and melioration of the estate. See case before the house of lords, *Hamilton and Lady Cardross*. 8 April 1712. Vide *Gilb.* 48.

Even judges in the finding of verdicts often more respect the substance than the circumstance; and therefore where the case concerneth the life of man, which is more favoured than any thing in the world, the judges regard the substance and not the circumstance. 9 *Co.* 112. *a.* 113. and the whole case.

7. *Max. Eq.* 53, &c. 1 *Chan. Ca.* 39, 150, 290, 260, 264, 265. 1 *Vern.* 83, 84, 85, 138, 159, 170, 176, &c. 17, 217, 201, 48. 2 *Vent.* 353. 1 *Chan. Ca.* 7, 132, 173, 208, 49. 2 *Chan. Ca.* 63, 49, 78. *Car.* 24. 2 *Rep. Chan.* 216, 218. 1 *Vern.* 13. 2 *Vent.* 350. 2 *Rep. Chan.* 212. *Hard.* 204. 1 *Rep. Chan.* 168, 283. 1 *Chan. Ca.* 176, 246, 10, 13. 1 *Rep. Chan.* 185. 2 *Chan. Ca.* 29, 30, 87, &c. *S. C.* 1 *Vern.* 79. 1 *Mod.* 310. 2 *Rep. Chan.* 24, 366. 1 *Chan. Ca.* 22, 138. 1 *Mod.* 300, 310. 2 *Rep. Chan.* 24, 366. 1 *Vern.* 20. 2 *Rep. Chan.* 23. 2 *Chan. Ca.* 95. 2 *Rep.* 26. 2 *Chan. Ca.* 109. 1 *Salk.* 231. 2 *Vent.* 352, 356. 1 *Vern.* 20, 83. 1 *Mod.* 306, 308. 1 *Vern.* 406.

8. See rule, *Limitations in restraint of marriage, &c.*

114. *Equity is to prevent multiplicity of suits, or circuitry of actions.*

1. **T**HE bill was for a perpetual injunction to stay the defendant from bringing any more ejectments to try his title at law,* suggesting that the plaintiff had five verdicts, and that it was an unreasonable vexation, &c. and therefore to put the plaintiff's title in perpetual peace was the bill. Lord keeper was of opinion, that to give this court an original jurisdiction, there ought to be a fraud or trust, or some accident to fall out in the case, or else to prevent some general inconvenience; as between the lord of a manor and the tenants to settle their several rights, if in case the right between the lord and the several tenants was to be settled by separate actions, the difficulty upon the lord would be insupportable by reason of the multiplicity of suits at law: the like in settling buttings and boundaries, &c. therefore this court will interpose, and direct an issue to be tried, which when tried, and the conscience of the court thereby informed and satisfied, this court will then put the whole in peace by a perpetual injunction. But this case his lordship thought was in its nature new, and did not fall under the general notion of a bill of peace; being only between A. and B. and one man is able to contend with another. He said he was very well satisfied of the vexatiousness of the defendant in this case; but then he said the law was clear in this point, and costs would attend the event of such trial. And if this case was a grievance in the law, it was proper for another jurisdiction, viz. in parliament, especially since parliaments are so frequent; so that it would be a piece of arrogance in him to take upon him the reformation of the law, though it needed it. *Gilb. 2. See 1 Vern. 22, 266, 308. Parl. Ca. 17. 1 Chan. Ca. 2, 121, 123.*

2. A bill was brought against an executor, to discover assets, and for satisfaction; it was said for the defendant, that the plaintiff ought not to have relief here; for that he had a proper remedy at law. But the court being possessed of the cause, and the same being as proper for this court as at law, it was decreed, to avoid circuitry of actions, that the defendant should account and make the plaintiff satisfaction. *2 Rep. Chan. 37.*

3. A guardian places his ward for education, and orders his correspondent to pay to a third person, from time to time, such money as should be demanded of him, for the use of the ward; in pursuance whereof several sums were paid to her, and for her use, and receipts taken from her as by order of the guardian. After the ward, being just come of age, came to the correspondent, and desired two several sums, which were paid her, and receipts taken as by order of the guardian. After the ward and guardian settled accounts, and exchanged releases, but these two sums were not brought to account. And now, after the guardian's death, it was decreed the ward should pay the correspondent; for it was her proper debt, and she was released from her guardian; and though the credit was at first given to the guardian, yet the money being paid to her, and not by her paid to the guardian, the correspondent had a fair claim against her, even to avoid circuitry of suits. *Parl. Ca. 17, 18.*

4. See

4. See 1 *Vern.* 22, 122, 266, 443, 498, 308. 1 *Chan. Ca.* 311. 2 *Chan. Ca.* 225. *Hard.* 115. *Gilb.* 227. *Barn. Lord and Lady Vane's case.* *Expediit reipub' ut fit finis litium propter communem omnium utilitatem.*

5. See also rules, *Aequitas sequitur legem*, ca. 5. *Discovery draws with it relief.* *Equity will never decree a suit where it may decree a remedy.*

115. Equity to relieve where there is no remedy at law.

1. **A** Copyholder can have no assise of common against his lord, but is to be relieved in equity. *Tot.* 108.

2. Equity will compel the lord of a manor to admit the tenant. If the lord will not hold a court, equity will compel him; for an action will not lie against the lord, and there is no remedy but in chancery. *Cro. Ja.* 368. 2 *Bulst.* 336. *S. C.*

3. So if an erroneous judgment be given in a copyhold court, in a *for-medon* or the like, a bill may be brought in equity to reverse it. 1 *Ro.* 373. *Lane* 98.

4. If the lord will exact arbitrary fines, equity will restrain him. *Dy.* 164. 1 *Rep. Chan.* 34, 96. 2 *Rep. Chan.* 134. For without this remedy in equity the lord might exact a fine to the value of the estate, and so the tenant lose his estate. *Max. Eq.* 24, 25.

5. A bill was brought for 3*l.* for a rent of 5*s.* *per annum*, arrear for 12 years, and also for the future rent, the plaintiff suggested that the deeds by which the rent was created, were lost; there was a proof of a constant payment of it till the last 12 years. And the master of the rolls decreed the defendant to pay the arrears and growing rent; because he said it was uncertain what kind of rent it was, and so no remedy at law: and here the person is made liable for the rent, which, for ought appeared, he was not at law. 1 *Chan. Ca.* 120.

6. The defendant's testator gave the plaintiff 1000*l.* payable at 21, the bill suggested the defendant wasted the estate, and prayed he might give security to pay the legacy when due. So decreed. 1 *Chan. Ca.* 121.

7. A rent or pension was of 1*l.* 14*s.* *per annum*, granted by H. 6. to Eaton college, issuing out of lands. Riggs, executor of the tertenant brought this bill to be relieved for the arrears of this rent in his testatrix's life-time. The bill suggested, that the college knew not the land out of which &c. and so could not distrain. Beauchamp was the present tertenant, and though the person of the tertenant was not chargeable with the rent at law, but only the lands by distress; yet forasmuch as the testatrix held the land, and did not pay the rent, it was said that thereby the personal estate of the testatrix was augmented. And so the master of the rolls decreed the executor to pay the arrears as far as he had effects of the testatrix's estate. 1 *Chan. Ca.* 121.

8 See 1 *Chan. Ca.* 78, 79, 144, 147, 146, 184, 198, 256, 257, 262, 267, 279, 280, 135, 148, 223, 238, 240, 243, 248, 193, 195. 2 *Chan. Ca.* 68, 188. *Nelf.* 242. *Doct. & Stud.* 85, 155. *Cary* 11. 1 *Vern.* 119. *Mar. Rep.* 159. *Nelf.* 378. 2 *Rep. Chan.* 387. 1 *Vern.* 367. *S. C.* *Show. Parl. Ca.* 67. 1 *Vern.* 309, 359. *Max. Eq.* 25. *Lat.* 24, 146. 1 *Ch. Ca.* 98, 286. 1 *Vern.* 455. 1 *Chan. Ca.* 271. 2 *Chan. Ca.* 84.

9. *Vide rule, Equity will prevent or redress wrongs and mischiefs.*

116. Equity will never decree a suit where it may decree a remedy.

1. **T**HOUGH the plaintiff hath had discovery here, which was insisted was the end of his suit, and so his bill to be dismissed. *Curia*: as to dismissal to law, because the plaintiff hath had discovery here, when the court can determine the matter, it shall not be an hand-maid to other courts, nor beget a suit to be ended elsewhere. 2 *Chan. Ca.* 200.

2. See 2 *Vern.* 429, 438, 458 or 498. 2 *Chan. Ca.* 201.

3. See rule, *Equity to prevent multiplicity of suits.*

117. Equity will not relieve where no fraud or covin.

1. **E**QUITY will not establish an agreement founded in fraud. *Prec. Chan.* 538, 574.

2. Where a woman is dowable by act or rule in law, equity will not bar her to claim her dower. *Cro. Ca.* 190, 191.

3. Fraud is always apparelled and clad with trust, and trust is the cover of fraud. 3 *Co. Twyne's case.*

4. Secrecy is a badge of fraud. *Ibid.* Vide 1 *Cro.* 138.

118. Equity will not aid new inventions in derogation of the common law, and tending to introduce perjury, forgery or fraud.

1. **I**T is in no man's power to create new natures in law, according to new inventions, except they may stand with *Jus commune*, which is *Natura universa*, &c. *Hob.* 154.

2. See *Gilb.* 63.

3. See rules, *The judges and sages of the law have always suppressed new and subtle inventions in derogation of the common law. Periculosum est res novas et inusitatas inducere. Ratio est radius divini luminis.*

119. Equity will prevent or redress wrongs and mischiefs.

General.

1. **T**HE Lord keeper was of opinion, that to give this court jurisdiction, there ought to be a fraud or trust, or some accident to follow in the case, or else some general inconvenience to be prevented. *Gilb.* 2.

2. In all cases where the matter lieth in compensation, whether the condition be precedent or subsequent, equity will relieve. 1 *Vern.* 83, 167, 223, 270, &c. 456. 2 *Vern.* 222, 561.

3. No advantage shall be taken of the penalty or forfeiture, where a compensation may be made. *Max. Eq.* 44, 45.

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4. Where a man has satisfied the obligation without taking an acquittance, or having any other evidence thereof, so as he is without remedy at common law, yet he may be holpen by *subpoena*, as he may in many other cases where conscience serveth for him. *Doct. & Stud. lib. 1. cap. 12.*

5. Equity hath jurisdiction to quiet men in their possession. *Per Coke. 3 Bull. 34. Lit. Rep. 166. S. C. 1 Ro. 190. 1 Vern. 156.*

6. Tenant, after possibility of issue extinct, so tenant for life, though by express grant dispensable of waste, shall be restrained from pulling down of houses, or defacing of a seat. *2 Chan. Ca. 32. Jointress tenant for life. Nels. 190, 220, 221. Tenant for life ordered to repair the destruction he had made, though dispensable. Prec. Chan. 455. An injunction was granted to stay waste in favour of an infant in ventre sa mere. Prec. Chan. 50. Barn. 274. Tenant per le curtesy enjoined from committing waste. Hard. 96. So of a jointress. Max. Eq. 30. margin. Waste done by one who held by covenant, therefore not punishable by law, yet holpen here. Tot. 285. So in felling timber. So in ploughing antient pasture. So of antient Meadow. Max. Eq. 30. margin.*

Particular cases.

7. If there be lessee for life; remainder for life; reversion or remainder in fee; lessee in possession does waste, though he is not punishable at law, yet he shall be restrained in chancery; for it is a particular mischief. *1 Ro. 377.*

8. Note a difference where the tenant is dispensable by the nature of his estate, or express grant, as also to the kind of waste; for the first shall be restrained generally, whilst the other shall only be restrained from the destruction of houses, &c. *1 Rep. Chan. 242. 1 Vern. 23. Salk. 161. 2 Chan. Ca. 23. Max. Eq. 30. margin.*

9. Goods were devised to the defendant for life, and after his death to the plaintiff, by whom a bill was brought to compel the defendant to give security for delivery to the plaintiff after defendant's death, or the value thereof, and decreed. *1 Rep. Chan. 110.*

10. The defendant's testator gave the plaintiff 1000*l.* payable at 21. The bill suggested that the defendant wasted the estate, and prayed he might give security to pay the legacy when due, and so decreed. *1 Chan. Ca. 121.*

11. An apprentice, after he is out of his time, may have a bill to oblige his master to sue the covenants of his indenture in a certain time; else the master might stay his action as long as he pleased, and till the plaintiff's witnesses were all dead. *1 Chan. Ca. 70.*

12. It being alledged in the bill, that the defendant, a surviving partner, carrying on a distinct trade for himself, with the persons who were debtors to the joint trade, to oblige such debtors, forbore to call in the debts: ordered on motion, that an able attorney be appointed to sue for and recover the debts; unless the defendant would give security to answer the moiety of the outstanding debts. *1 Vern. 118.*

13. The wife being *priviment ensent* at the death of her husband, the child *in ventre sa mere* could not be provided for by the law, yet this court ordered that the child should have sufficient allowance. *Tot. 157.*

14. An officer within the statute 5 E. 6. (as I take is a surrogate) makes a defeazance of his office, rendering thereout 90*l.* *per annum*, and exhibits a bill to have an account. The defendant pleads the deputation void by the statute; and ought to have no account, it being in effect a farm within the statute. *Curia*: After long debate the plea was allowed. 2 *Chan. Ca.* 42. See 48. 2 *Inst.* 148.

This statute is provided against the selling of offices, and extendeth as well to offices ecclesiastical, as to temporal offices concerning the administration of justice. See 1 *Ju. Eccl.* 233.

15. How the ecclesiastical courts are in many cases compelled to do their duty, and restrained in their encroachments on temporal jurisdiction, and the prerogative of the crown, and rights of the subject. See 1 *Ju. Eccl.* tit. *Mandamus, Prohibition, Praemunire, &c.*

16. See 1 *Chan. Ca.* 1, 2, 3, 15, 16, 46, 47, 48, 224. 2 *Vern.* 186. 1 *Vern.* 23, 32, 61, 73, 198, 190, 415, 416. 1 *Chan. Ca.* 55, 56, 3, 47, 152, 270. *Gilb.* 23, 208. 2 *Chan. Ca.* 225. *Nelf.* 236. 2 *Chan. Ca.* 67, 76, 165. 1 *Chan. Ca.* 75, 80. 2 *Chan. Ca.* 42, 48. *Car.* 65. 1 *Vern.* 190. 1 *Ro.* 383. 1 *Vern.* 105, 185, 308, 312. 1 *Rep. Chan.* 41. 1 *Vern.* 456, 469. 2 *Vern.* 426.

17. See rules, *Equity favours younger children. Equity to execute the intent of the parties. Ecclesiastical courts may not hold plea of matters determinable at law or in equity. Admiralty not to hold plea of matters cognizable at law. Equity hath a concurrent jurisdiction with the admiralty. Equity hath a concurrent jurisdiction with the ecclesiastical courts.*

120. Equity relieves against accidents.

1. **A**ccidents are proper objects of relief. 2 *Chan. Ca.* 30.

2. Obligee in a bond loseth it by accident, equity will relieve. *Lat.* 24. Though the bond voluntary. 1 *Chan. Ca.* 77.

3. An executor under a revoked will, without notice of the revocation, pays legacies, and after the revocation is proved, he shall be allowed those legacies. 1 *Chan. Ca.* 126.

4. The trustee for an infant receiveth 40*l.* of the trust-money, and is robbed by his servant of 200*l.* whereof the 40*l.* was part, he shall be allowed it; for he was only to keep it as his own. 2 *Chan. Ca.* 2.

5. A bond was entered into before the wars, conditioned to pay 40*l.* *per annum* for 12 years, out of the profits of an office, which was taken away by the usurpation. The obligor being sued on the bond, and the office revived, he exhibited his bill to be relieved against the bond. The obligee insisted that the office continued some part of the 12 years, and being now revived, the obligor ought to pay the 40*l.* *per annum* for the 12 years or be dismissed; for the obligee having the law with him, ought not to be hurt in equity, without satisfaction according to the condition. It was decreed the obligor should pay the 40*l.* *per annum*, for so many years as the office continued, and thereupon the bond to be delivered up. 1 *Chan. Ca.* 72. See 83, 84.

6. The cause being heard about 1664, and one point being, that the heir of the obligor having paid a debt of his ancestor's upon bond, might be reimbursed by the executor of the obligor, who had personal assets, the heir

heir having been forced by suit to pay the debt. Decreed for the heir. Upon exceptions taken to a report in this cause, which came on before Mr. baron *Atkins*, 29 June 1668; there was this point. Whereas *A.* alone was bound to the testator, the executor delivered up the bond, and took another to himself for the same debt, whereby, as was alledged by the counsel for the executor, the security was bettered; and whether this in equity should be charged as assets in the executor's hands, he having delivered up the old bond, was the question? Against him it was insisted, that taking the new bond had altered the property of the debt, so that if the executor died intestate, his administrator would have the debt: whereas had it rested on the old bond, the administrator *de bonis non* of the first testator should have it, subject to the first testator's debts. It was admitted, that at law this charged the executor as a conversion and receipt of so much of the estate. But it was insisted, that in equity he having taken the same person and another bound, and offering to assign the bond to the heir, it ought not to charge him: especially when the heir is plaintiff in equity, as here. And it was ruled, that the executor should not be charged with the money by altering the security, but that he should assign it to the heir. 1 *Chan. Ca.* 74. For it is not equity that the executor should suffer for his care in taking a new bond with further security; and the debt was lost not by his default, but through accident only, against which equity relieves.

7. See 1 *Chan. Ca.* 72, 83, 84, 126, 191, 78. 2 *Chan. Ca.* 16, 207, 208. 1 *Vern.* 60, 460. *Max. Eq.* 29, 8.

8. *Vide* rule, *Equity will prevent or redress wrongs and mischiefs.*

121. Equity requires that a gift which defeats other, shall be made upon as high and good consideration as the things are, which are to be defeated thereby.

1. **I**F a man be indebted to five several persons in the several sums of 20*l.* and hath goods to the value of 20*l.* and makes a gift to one of them of all his goods, in satisfaction of his debt, but there is a trust between them that the donee shall deal favourably with him in regard of his poverty, or to permit him, or some other for him, to use the good, for his benefit, and is content to be paid when the donor shall be able: this shall not be said to be *bona fide* within the statute 13 *Eliz. cap.* 5. for to be *bona fide* it ought to be in a public manner made, before the neighbours, and not in secret; for secrecy is a badge of fraud. Also the goods ought to be fairly appraised, and the continuance of possession in the grantor is another mark of fraud, &c. and the words *good consideration* and *bona fide* do not extend to every gift made *bona fide*; and therefore there are two sorts of gifts or good consideration, (*scilicet*) Consideration of nature or blood, and valuable consideration. As to the first, in the case put before, if he so indebted, in consideration of natural affection, give all his goods to his son or cousin; as the others would lose their debts, &c. which are things of value, the intention of the act was that the consideration in such case should be valuable; for equity requires, that a gift which defeats another should be made upon as high and good consideration as the things are which are to be defeated by it. 3 *Co.* 81, &c.

2. See *Plow. Com.* 50. b. 351. a.

122. Equity to relieve against fraud.

General.

1. **F**OR force, fraud and accident, equity relieves. 1 *Chan. Ca.* 72. Fraud is a thing odious. 3 *Chan. Ca.* 85. It is the mother of wrangle, contention and intricacy. *Co. Lit.* 3. *b.* It comprehends all manner of unfair means to cheat another. *Nelf.* 439. It is not to be presumed, but must be proved; and so none is to be convicted of fraud where the evidence is doubtful. 3 *Chan. Ca.* 85, 114. It is neither presumed by common or civil law. *Nelf.* 185. A man is not to be presumed guilty of fraud on his death bed. *Nelf.* 16. *Prec. Chan.* 303, 304. Fraud properly relievable in equity. 1 *Chan. Ca.* 291. Fraud or covin vitiates such acts as in their own nature or simply are lawful; equity will relieve in cases of fraud where the defendant suppressed a marriage settlement. Decreed against him, that the plaintiff should enjoy. 1 *Chan. Ca.* 270. 3 *Chan. Ca.* 122. *Nelf.* 185. Where he, who has right, tells the purchaser that the vendor has a good estate, when he knew not the contrary at the time. 2 *Chan. Ca.* 108, 128. Where the husband accounted with his wife's guardian before marriage. 2 *Chan. Ca.* 159, 160. Where one is prevailed with by false suggestions. 3 *Chan. Ca.* 74, 87, 61, 94, 103, 104. *Prec. Chan.* 3, 4. Where concealment. 3 *Chan. Ca.* 104, 105. Where there is surprize attended with fraud and circumvention. *Chan. Ca.* 114, 115, 56, 59, 74, 75, 80. *Nelf.* 431. Where the reversion is fraudulently conveyed to him who had the term, to hinder younger children from having their shares by merger of the term. *Nelf.* 220. Where young heirs are brought into unequal bargains. 1 *Chan. Ca.* 276. 2 *Chan. Ca.* 120, 121, 137. *Nelf.* 295, 296. *Prec. Chan.* 150, 218. Where fraud is used to draw in purchasers. 2 *Chan. Ca.* 108, 128. * 3 *Chan. Ca.* 85. *Nelf.* 394. Equity will never give countenance to demands of an unfair nature, as in the particular case it was for attending at auctions as a puff to enhance the price of goods; nor suffer them to be set up against just and fair demands. In an account, a cross bill for such purpose dismissed with costs. See case before the house of lords, * *Walker and Gascoigne*, 6 March 1726. When advantage is taken, either in value, or consideration of the ignorance or distress of the vendor, set aside, and purchase deed only to stand a security for what was really and *bona fide* paid. See the cases * *Gold versus Morgan*, 24 March 1730, and * *Furgason and Maitland*, 25 March 1731, both before the house of lords.

Particular cases.

2. Trustee in fraud settles the trust-estate on his own daughter in marriage, set aside. *Nelf.* 470.

3. A copyholder having surrendered to the use of himself and his wife and their daughters, then mortgages. This mortgage not allowed to defeat the settlement; for as it was a copyhold, the mortgagee might easily have known the husband's estate. *Prec. Chan.* 1. *But if it had been a real estate, I conceive it had been otherwise.*

4. A man of an estate employs a scrivener to procure him 1000*l.* of some gentleman, declaring he will not have it of a mechanic. The scri-

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vener treated with a vintner, and receives and pays his client 300*l.* of the money, and takes 300*l.* to himself, and the rest, being 400*l.* was delivered in wines not worth more than 150*l.* the gentleman gave recognizance, which being sued, he brought the present bill. And decreed a perpetual injunction against the recognizance on the plaintiff's payment of the 300*l.* and interest. *Prec. Chan.* 81.

5. The bill was to be relieved against a purchase made by the defendants from the plaintiff's father, suggesting he had been circumvented and imposed upon by the defendants, who insisted on their purchase; and shew, that first, there were articles, and then conveyances and a fine. And the father, seeing the plaintiff uneasy thereat, took a release from him of all his right. Notwithstanding all this, the lord keeper set the purchase aside, it appearing art was used by the defendant, he pretending to help the father to a wife with a great fortune, he being almost in his dotage, and that to qualify himself for the lady, it was necessary that he should convert his land into money, though it was proved he was sensible, and absolute owner, and might have sold or given his estate away, and that after it was done he said that if it was then to do, he would do it. 1 *Vern.* 205, 206.

6. An uncle on the marriage of his niece gives 1200*l.* and the father takes bond from the son-in-law for 200*l.* if the daughter dies *sans* issue, living the husband, the daughter after died without issue. On the bond being sued, the husband brings the present bill, and is relieved; the bond being in nature of a marriage-brochage bond. *Prec. Chan.* 267.

7. *Lukener* brings an action against *Montagu* for lying with his wife; pending the suit, *Montagu* conveys in trust to pay debts in the schedule annexed, and such as he should appoint in such a time. *Lukener* recovers 5000*l.* and brought the present bill to be relieved against this deed as fraudulent. *Curia*: The deed is not fraudulent either at law or in equity, for the debts named in the deed; for the plaintiff was no creditor then; and though it was made to prefer his real creditors, before this debt when it should come to be such, yet this was a debt only founded in malefeazance or tort; and therefore it was conscience in him to prefer the others before it. But the plaintiff may have an interest in the surplus, after the debts provided for by the deed, in which those appointed in ten days are included. *Prec. Chan.* 106.

8. The husband coming home, found the plaintiff naked, going to bed to his wife; and thereupon the plaintiff gave him a note for 500*l.* and after gave judgment, and last of all surrendered a copyhold by way of mortgage as a security. On a bill to be relieved against the security, alledging a contrivance, and that he was drunk, and that he was threatened. Lord chancellor: There is no proof of a plot, or that he was so disordered or frightened, for he continued of the same mind in cool blood, at giving several securities, and joined in the report, that it was for a bargain of grass: if a jury had given damages, equity could not have relieved: and why here? where he has settled them against himself; it shews he thought them reasonable. Let the bill be dismissed, but without costs, the defendant having bragged of his bargain. But his lordship said he would relieve against the penalties. *Prec. Chan.* 266.

9. *Thomas*, earl of *Ardglaf*, for 300*l.* anno 1675, granted a rent-charge of 300*l.* *per annum* out of his estate of 1000*l.* *per annum*, to hold to the defen-

defendant and his heirs for ever, to commence from the first *Michaelmas* or *Lady-day* after the grantor's death without issue male, with a proviso to be void if he should have issue male, which should attain 21; after the grantor makes a settlement of his estate, for 300*l.* to the use of himself for life; remainder in tail to all his issue male; remainder in tail to the plaintiff his uncle, which was according to a former settlement made by the ancestor of his family, and which the grantor on his marriage had barred: and then the plaintiff, and earl *Thomas* brought their bill to be relieved against this grant: after the bill brought, the defendant got a release from earl *Thomas* the grantor; and the now earl's bill was, that earl *Thomas* being dead, to set aside the grant and release on payment of 300*l.* and interest. On the rehearing many cases were cited where unreasonable bargains made with young heirs had been set aside here. And when this bargain was made, the earl was very young, had left his lady, and lived in riot and debauchery, and that the consideration was but one year's purchase, and that the contingency of the earl's dying without issue, was an artifice of the defendant's, the earl being disabled, as appeared in proof, to get children, and that so the defendant had been informed by the earl's surgeon, and therefore the contingency ought not to be looked upon but as it was in the defendant's eye, who was his companion in his debaucheries. And it appeared he was solicitous to draw the earl into like bargains with other people; and as to the release, that it was obtained without consideration, and that after the said settlement made on the plaintiff. Lord keeper declared he was fully satisfied in the decree before made, which was for a reconveyance or release on payment, and perpetual injunction. And said, if he was to die presently he would make it. About a year after there was another bill, and the case was, *George Pitt*, Esq; had got a like grant of 300*l. per annum*, from the same lord by *Muschamp*, defendant in the former cause, his agency, and the decree was to reconvey or release on like payment of principal and interest, and also a perpetual injunction. *Fraus est celare fraudem*. *Pitt* pretended ignorance, that he did not know the earl, and that he did not make the bargain himself; but that was by reason of a consciousness he had that he should be examined to it. 1 *Vern.* 237, &c. *Vere Essex* earl of *Ardglasse* plaintiff, *Henry Muschamp* defendant, and earl *Ardglasse* against *Pitt*.

10. The father tenant for life draws his son, being in distress, in to suffer a recovery; the son was relieved by setting the recovery aside. *Barn.* 433.

11. On treaty of marriage between the plaintiff and her husband, her father would not consent, because the husband was indebted 200*l.* to *B.* on bond, in which he and his mother were bound; to remove which objection, the mother and her younger son gave a fresh bond to *B.* and the former bond was cancelled, but the husband after gave his brother a counter-bond, and paid the interest during his life; and it was in proof that the now widow the present plaintiff, being in love, contrived this way to satisfy her father, and that the marriage might take effect. But now being sued by the brother on the counter-bond as administratrix to her husband, she brought her bill to be relieved. Lord chancellor: This is a plain fraud, and contrivance, by which the father was drawn in, and his lordship declared, if the husband had been plaintiff he should have been relieved; and therefore decreed the bond to be delivered up. 1 *Vern.* 348.

12. There

12. There is no doubt but an infant may be a trustee, and accountable for a breach of trust committed after he attains his full age, as was the principal case. 1 *Vern.* 342, &c. *Jevon and Bush.* See the case at full under rule, *Equity may carry the debt beyond the penalty on circumstances,* case 4.

* 13. Though there be no direct proof, that a man is *non compos* or delirious, yet if the deed was executed *in extremis*, it cannot be supposed that he had a mind adequate to the business he was about, and that he might more easily be imposed upon, especially the provision in the deed being something extraordinary. See case *Fane* and *The duke of Devonshire*, before the lords, 16 *Jan.* 1718.

* 14. A lease obtained from one *non compos* set aside. See case *Val. Quin,* Esq; and *Langley Clerk*, on an appeal from the exchequer in *Ireland*, and heard before the house of lords, 21 *April* 1736.

* 15. An agreement was between a mother and her son, and was relieved against; for that the deeds executed between them were for the mother to resign her jointure and accept an annuity; she being at the time harassed and uneasy. See case before the house of lords *Archer and Archer*, 2 *March* 1718. Also case * *Clarke and More*, 26 *Nov.* 1718. See also lord *Dyer's* readings upon the statute of wills, 4.

* 16. Advantage taken of the vendor's unhappy circumstances, being in gaol, and exceeding poor, by drawing him into an unequal agreement for the sale of his estate, set aside, and the estate made a security only for the money really and *bona fide* advanced, with interest: and this, though the purchaser was really to run great hazard, and to be at great expence and trouble, in many foreseen and unavoidable law suits about the premises, and also was at the hazard of losing the advance-money, and expences in the future, to be laid out by him, being in all likelihood never able to reimburse himself in case he should fail of success in the litigations, and disappointed of the estate. See case before the house of lords * *Gordon and Crawford*, 17 *April* 1730. See also * *Gold and Morgan*, 24 *March* 1730. *Furgason* and *Maitland*, 17 *March* 1731.

17. The defendant had drawn in the plaintiff, being a young man, and purchased of him his estate at a great under-value, the title being defective and the tenant evicted; there being a covenant for quiet enjoyment and other securities entered into by the plaintiff, the bill was for relief against actions on these covenants. And for the defendant it was said, that he ought to have the value of the lands evicted. *Curia*: The defendant, who was a lawyer, and ought to have understood a title, purchased at great under-value, and the title being defective and the land evicted, it is unreasonable he should make any advantage of this *catching bargain*; and therefore decreed him his purchase-money without interest, only deducting mesne profits. 1 *Vern.* 320. *Zouche* versus *Swaine*.

* 18. The estate not answering in value to the particulars to be allowed for. See case *Sir William Barker, Bart.* versus *Damer*, before the house of lords. 7 *April* 1731. Note; *This was in favour of the heir under a marriage agreement.*

* 19. Eight days after the wife came of age, and two days before her marriage, she was drawn in to execute a release without her husband's privity;

vity; the treaty of marriage being public, the release was set aside. See case *Norton and Heron*, before the house of lords, 21 April 1732.

20. Where there is a parol agreement made for a lease, and the lessee enters and builds, this court will establish it on the foot of fraud in the lessor, notwithstanding the statute of frauds, &c. because contracts executed in part, are not always within the statute, though executory contracts are. 2 *Mod. Ca.* 35. *Savage and Foster*.

21. The mother, at the request of her brother, who being ill, and not having time to surrender a copyhold to the use of his will, gave bond to her son, for whom the brother intended the said copyhold, to surrender to him, where in fact she was heir. Decreed she was a trustee for her son. 2 *Mod. Ca.* 62, 63. 1 *Vern.* 296.

22. One having made his wife executrix, the son persuaded her to prevail with his father to make a new will, and to name him executor, promising to be a trustee for his mother: this trust was decreed. 2 *Mod. Ca.* 62, 63. 1 *Vern.* 296.

23. See 1 *Rep. Chan.* 10, 132, 146, 188. 2 *Rep. Chan.* 266, 396. 3 *Rep. Chan.* 74, 75. *Co. Lit.* 4. a. 3 *Co.* 80. *Stat.* 13 *Eliz.* cap. 5. 27 *Eliz.* cap. 4. 29 *Car.* 2. *Elf. Obs.* 107, 108. *Mar. Rep.* 183. 1 *Ch. Ca.* 99, 217, 225, 133, 154, 276, 74, 75, 83, 118, 150, 256, 292, 27, 30, 37. 2 *Chan. Ca.* 2, 16, 17, 103, 144, 186, 240, 249, 120, 137. 3 *Chan. Ca.* 64, 91, 122. *Nel.* 209, 295, 298, 322, 287. 1 *Vern.* 19, 20, 32, 71, 75, 86, 131, 135, 167, 271, 277, 141, 145, 218, 227, 285, 370, 294, 320, 186, 474, 408, 409, 411, 412, 431, 451, 452, 277. 2 *Vern.* 14, 27, 33, 77, 107, 445, 465, 467, 468, 469, 475, 348, 480, 483, 484, 230, 488, 145. *Prec. Chan.* 13, 14, 17, 18, 132, 76, 165, 218, 233, 157, 522. *Gilb.* 122, 148, 169, 221, 222, 259. 1 *Lev.* 197. *Lutw.* 484. 3 *Lev.* 118. *Salk.* 344. 4 *Mod.* 406, 410. 5 *Mod.* 4. all *S.C.* 5 *Mod.* 175. 2 *Vent.* 175, 359. 1 *Danv.* 28. 1 *Show.* 35. 3 *Mod.* 239. 5 *Mod.* 13, 14. 1 *Vent.* 489. *Lutw.* 130. 3 *Keb.* 672. 5 *Mod.* 351. * See cases before the house of lords, * *Murray and Charters*, 28 March 1734. * *Austen and Flack*, 20 Feb. 1733, and * *Sherret's case*, 14 April 1735.

123. Equity to relieve where the matter lieth in compensation.

General to, and rules.

1. IT is laid down as a rule, that in all cases where the matter lieth in compensation, let the condition be precedent or subsequent. equity will relieve. 1 *Vern.* 83, 167, 223, 270, &c. 456. 2 *Vern.* 222, 561. *Salk.* 156. *Max. Eq.* 44, &c. It is also a general rule, that a nude agreement is not good either in law or equity. *Contra*, if the consideration be only unequal. 1 *Chan. Ca.* 42.

2. If a man be bound in a penalty to pay money at a day and place by obligation, and intending to pay it, is robbed by the way; or hath intreated by word some further respite at the hands of the obligee, or cometh short of the same by any misfortune, and so failing of the payment, doth nevertheless provide and tender the money in a short time after; in these and many

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other such like cases the chancery will compel the obligee to take his principal with some reasonable consideration of his damages (*quantum expedit*); for if this was not so, men would do that by covenant which they do now by bond. *Cary* 1. The like favour is extended against such as would take advantage, upon any strict condition, for undoing the estate of another in lands upon a small or trifling default. *Cary* 1. So if two be jointly and severally bound to pay money, and the obligee will give longer day, or other favour to the one, and then will sue the other for the debt, he so sued may sue in chancery. 9 E. 4. 41. *Cary* 1. Where an obligee is surety and sued alone, by the custom of *London*, he shall make the rest contribute. So where the surety pays a debt and has no counter-bond, by the same custom he shall maintain an action against the principal. 1 *Vern.* 456. Wherever the court can give compensation, it can relieve. *Salk.* 156.

Particular cases.

3. One devises lands to his younger son, called *Styles*, and by his will declares that in case his said son be in any wise hindered or prevented from enjoying those lands, then in lieu he gave him all those lands called *Barabar*. The plaintiff charges that he was heir of the devisor, but that neither he nor the devisor were intitled to more than a moiety of *Styles*, and that the defendant *J. N.* a stranger, was intitled to the other moiety, and had evicted the devisee; and sets forth, that *Barabar* was of much greater value than *Styles*, and that it was not his fault that the devisee did not enjoy, and charged a combination between the defendants, and prays relief as to the over-value of *Barabar*. *Cur'*: This being a condition that lay in compensation, the plaintiff ought to be relieved, and decreed the devisee should have a compensation for the land evicted, set out in *Barabar*. 1 *Vern.* 270, 271.

4. A creditor agrees with his debtor to take less than his debt, so it should be paid precisely at such a day. The debtor fails of payment, and brings this bill, suggesting some equitable excuses for not making precise payment, and that he tendered the money within a day or two, and that the defendant refused, and sued for the whole at law. Demurrer, because the bill contained no equity, and that the plaintiff having made failure, the defendant was not bound to take less. Lord keeper allowed the demurrer, and said *Cujus est dare ejus est disponere*. 1 *Vern.* 210.

5. On review, the error assigned was, that the defendant's wife's father having given portions to his daughters, in case they should release to his heir their right to certain lands. One of the daughters happened to die before she had released, and therefore the heir refused to pay the portions, which was 2000*l.* to each daughter, and the lands to be released were not worth 500*l.* the performance of the condition was prevented by the act of God. The defendant demurred, and insisted, that this was a condition precedent, and not being performed there could be no relief; and cited *Fry and Porter's* case, and the words here are, *If his daughters should release, then be appointed such and such portions*. Mr. serjeant *Maynard* made a difference between a condition on giving a portion, and a portion given on condition; for in the former case the portion does never arise unless the condition be performed. Lord keeper inclined to over-rule the demurrer. Agreed the cause to be heard *de integro*. 1 *Vern.* 222.

6. The trustees of the estate of *Thomas Wentworth*, an infant, having raised 3000*l.* out of the real estate of their infant, which was then in hand, they laid it out in lands which lay commodious to the infant's estate, and took the conveyance in their own names, in trust for him, in case when he became of age he should accept the same at the price; and this was done with the consent of the grandmother, who was the infant's guardian. The infant died under age; and the question was, Whether the heir of the infant should have the estate, or whether it should be looked upon as a security for the money, and go to the administrator of the infant? Decreed, the trustees should pay the 3000*l.* to the administrator with interest only according to what they had made by the profits of the purchased lands. 1 *Vern.* 403, &c. 435, &c.

7. *Straton*, a freeman of *London*, having a son and daughter, devised two thirds of his legatory part to his daughter, but if she married without the consent of her mother, her brother was to have 500*l.* of what was so given to the daughter. She married *sans* consent of her mother. *Per curiam*: This is not to be taken *in terrorem* only; but on her marriage without consent, the bequest is a good bequest over, and an interest vested in the brother, who in this case may be looked on as a person the testator considered, and had in his thoughts as well as the daughter, as to provision, and was, according to the difference taken by lord chief justice *Hale*, in the case for *Henry Bellafise*, and in the case *Davis* and *Hatton*, 2 *Vern.* 357.

8. A father left his daughters 20000*l.* each at 21 or marriage, which should first happen, so as the marriage was with the consent of the mother and trustees, and after they should be respectively 16, and if they either married before that age or without consent, then such daughter to have only 10000*l.* And directed the surplus of his personal estate should be vested in lands and settled on his daughters and their issue, with cross remainders; in the father's life-time a treaty of marriage was in hand between the plaintiff and his lady, but before agreement the father died, and the plaintiff married his said lady before 16, but with consent. *Quære*, Whether she should have 20000*l.* or only 10000*l.* The duke of *Southampton's* case was cited, where relief was given in like case; and the court decreed the 20000*l.* to the plaintiff, &c. 2 *Vern.* 223, 224.

9. *Pritty*, by will gave 3000*l.* to his daughter at 21 or marriage, and put her in the care of *Scriven*. There was a proviso if she married without *Scriven's* consent, her legacy which was 3000*l.* was to cease, and to be but 500*l.* and made the defendant, his son, executor and residuary legatee. She married without consent, yet the court decreed her the whole 3000*l.* with interest from her marriage; and principally because it was not devised over, but to fall into the surplus. 2 *Vern.* 294.

10. *H.* devised lands to *J. S.* and his heirs, on condition to pay 20000*l.* to the heir at law, *viz.* 1000*l.* a year for the first 16 years, and 2000*l.* *per annum* till the whole should be paid; and the heir entered for non-payment of one of the 1000*l.* *per annum*, and *J. S.* brought his bill; and it was objected that the condition restores the heir, and that chancery ought not to aid in disinherison of him: but it was resolved by *Cowper*, lord chancellor, 1st, That the entry of the heir in the present case, was only to enforce the payment of his principal, as where a mortgagee enters; and that

that the court can give him interest for the same from the time it became payable; and that wheresoever the court can give satisfaction or compensation for the breach of a condition, they can relieve. 2dly, That for every 1000 *l.* from the time it became payable, the legatee or heir should have interest; because both the sum and time were certain and past. 3dly, That there is to be no deduction of any taxes; because it is not to issue or arise from the lands, but is given as a sum in gross, secured by entry on the land for non-payment. *Salk.* 156.

11. See 1 *Vern.* 19, 20, 32, 68, 79, 167, *S.C.* 456, 260, 319. 2 *Vern.* 452. 1 *Chan. Ca.* 138, 183, 142, 189, 95, 96, 89, 226, 122, 40, 58, 141, 142, 108, 22. 2 *Rep. Chan.* 23, 24, 95, 26. 1 *Mod.* 300, 306, 308. 2 *Chan. Ca.* 23, 95, 198. *Salk.* 231. 1 *Rep. Chan.* 1, 22. 1 *Mod.* 310. 2 *Rep. Chan.* 366, 391. 2 *Vent.* 356, 352. 1 *Chan. Ca.* 110, 184. 1 *Sid.* 442. 2 *Chan. Ca.* 219, 241. 1 *Chan. Ca.* 170, 24, 226, 184, 189. 3 *Chan. Ca.* 135. *Nelf.* 47. *Prec. Chan.* 533. 1 *Vern.* 223, 207. *Nelf.* 98, 145, 234, 236, 183, 244, 261. *Skin.* 285. *Gilb.* 26, 27. *Prec. Chan.* 348. 2 *Pe. Will.* 626. *Doct. & Stud.* *Cary's Rep. Tot. Bacon's Abr. Ca. Eq.*

124. Equity will relieve against one's own act according to circumstances.

1. BY statute 11 *H. 7. inter al'* it is enacted, if any woman, who hath lands of the gift of her husband, or any the ancestors of the husband, suffer any recovery against her by covin, such recovery shall be void, and it shall be lawful for him, who should have the land after the woman, to enter, and to hold as in his first right, &c. *Doct. & Stud. lib. 1. cap. 31.*

2. If two men have a wood jointly, and one sell it, and keepeth the money to himself, his companion hath no remedy at law, for that when they took the wood jointly they put each other in trust, and were content to occupy together; therefore the law suffers them to order the profits thereof according to the trust that each put in the other. And yet he who took all the profits is bound in conscience to render half to his fellow; for as the law giveth him a right only to half the land, so it giveth him a right only in conscience to half the profits; and yet it cannot be said that the law is against conscience; for the law willeth not that one shall take all the profits, but leaveth it to their conscience. *Elf. Obf.* 78. See *Doct. & Stud. lib. 1. cap. 19.*

3. By a marriage agreement the intended wife was to have more than her father, mother, and two sisters, and the father was greatly indebted. The court would not decree the agreement, but left the plaintiff to law. 2 *Chan. Ca.* 17.

4. See *Nelf.* 46. 1 *Chan. Ca.* 16. 1 *Vern.* 348. *Prec. Chan.* 538, 574.

125. Equity to supply defects.

1. *J.* S. being seised of lands in *Dorsetshire*, *Somersetshire* and *Devonshire*, those in *Dorsetshire* being of equal value with both the others. And having two nephews, one the son of his sister *Henley*, the other of his sister *Lee*, to prevent disputes he executed a conveyance, and settled all to the use of himself for life; the remainder to his son, if he should happen to have any intail. And then appointed the lands in *Dorsetshire* to his nephew *Henley*, and in the other counties to his other nephew, and in numbering them up, a farm of 60*l.* *per annum*, was omitted, but in the limitation to *Henley* came these words, *And all other my lands and tenements, whereof no use is already limited, the same shall be unto the use of my nephew Henley, &c.* by which words, *Henley's* counsel would have it pass to him; to which it was answered by the counsel on *Lee's* part, that it could not pass by the general words; for though there is that omission when he distributed the land, yet in the limitation to himself for life, remainder in tail, there mention is made of it, so it is not within the general words, *Whereof no use has been already limited*; for an use hath been limited to himself for life. And *Lee's* counsel insisted he ought to have it, because the scrivener swore it was intended him, and so was his instructions, and it was purely the omission of the clerk. But the chancellor would decree for neither, but left the land in question to descend equally between the two nephews. 1 *Vern.* 37, 38.

2. A conveyance, purporting a feoffment, may operate as a covenant to stand seised; though generally a defect in a voluntary conveyance shall not be supplied and made good here, yet if a man voluntarily make a settlement, as a provision for his children, and for their maintenance, such voluntary conveyance shall be supplied and made good here. 1 *Vern.* 40.

3. A man by will made a provision for his younger children out of copyhold lands, but the surrender was made into the hands of one customary tenant only, and so defective. Yet decreed for the younger children, and so the defect well supplied against the heir at law; there being many precedents in the court of chancery. 1 *Vern.* 132, 133.

4. A feme covert agrees to sell her inheritance, so she might have 200*l.* secured to her. The lands were sold, and the money vested in trustees. A creditor of the husband brings the present bill to subject the money to the payment of his debt and charge; the wife promised it should be chargeable. *Per Curiam*: This money shall not be liable to the payment of any of the husband's debts, nor shall any promise by the wife for that purpose, subsequent to the original agreement, be obliging on that behalf. 2 *Vern.* 64, 65.

5. Where a feme covenants, by agreement with her husband, to surrender or levy a fine, though the husband die before it be done, yet this court will compel her to make good the agreement. 2 *Vern.* 61.

6. The plaintiff lent 50*l.* to the defendant's uncle, and took a warrant of attorney to confess judgment in ejectment for three closes upon a feigned demise for 20 years. *Court*: It is a defective security, and amounts to an agreement in equity to charge the lands, and decreed accordingly against the heir. 2 *Vern.* 151.

7. A devise of a personalty for life to the wife, though not said to be in lieu of dower. Yet lord *Sommers* held it ought in equity to be so taken, &c. For collateral satisfaction may be a good bar to dower. 2 Vern. 365.

8. Where the words *Shall stand and be seised*, left out of a conveyance made in pursuance of marriage articles, were supplied against the heir, and the plaintiff decreed to enjoy, as though the words had been in. 1 Rep. Chan. 162.

9. Resolved, That a recovery of *Cestuy que trust* shall bar, and transfer the trust as it should an estate at law, if it were upon consideration. 1 Ch. Ca. 49. See 68, 213. 2 Vent. 350. 2 Chan. Ca. 64, 71, 78. 1 Vern. 14.

10. See 1 Chan. Ca. 10, 35, 23, 39, 70, 87, 173, 208, 236, 263, 264. 2 Chan. Ca. 63, 68, 71, 78, 29, 30, 87. Car. 24. 1 Vern. 13. 2 Vern. 69, 163, &c. Tot. 131. 1 Rep. Chan. 168, 183, 185, 283. 3 Chan. Ca. 86. 2 Rep. Chan. 68, 216, 212, 218, 432.

11. Vide rule, *Marriage the highest consideration in law*.

126. *Equity will not vest an estate, where by reason of a condition precedent it will not vest at law; but of conditions subsequent, which are to divest an estate, it is otherwise.*

WIDE rules, *Conditions precedent must be literally performed; not so of subsequent ones where the court can make compensation. Equity to relieve where the matter lieth in compensation.*

127. *Estate of testator, in whosesoever hands, ought to be liable to his legacies.*

SEE rule, *Equity proper place to relieve legatees.* 1 Chan. Ca. 57.

128. *Est boni judicis ampliare jurisdictionem.*

General.

1. **T**HE judges and sages of the law, for matters in law, are called, and indeed to all intents of law such they are, *Consilium regis*. Co. Lit. 304. a. b. Hob. 163. And they in his courts, by his immediate authority, have power derived down to them from the king, to keep all inferior jurisdictions within their several limits, and to enforce them to do their several offices where they are negligent therein. And so it is that they suspend the proceedings of the ecclesiastical courts by prohibition, &c. and, if cause be, can send their writs mandatory, commanding these inferior courts to discharge their office to their suitors, as are *Ha. Anal.* 20. and almost infinite other authorities. And the temporal judges are by no means bound by the rules of the civil or ecclesiastical laws, but are at full liberty to follow the course of their own law and courts, where the others differ from them. 1 Pe. Will. 12. And therefore it is with the highest regard, and the utmost deference to their

lordships, the temporal judges, I speak it from the authority of my lord Coke, they are always to have an eye that the ecclesiastical jurisdiction usurp not upon the temporal. 2 Inst. 615. And to preserve the laws of the realm in their full force and authority, and to suppress and punish all invasions thereon, as the same are the preservers of the prerogative royal, and the rights and liberties of the people; for *major hæreditas venit unicuique nostrum a jure legibus quam a parentibus*. And therefore they are to see that none of the inferior courts extend their power beyond their due and limited bounds, to the derogation of the temporal laws and courts; and not only so, but they may extend temporal jurisdiction, so as to come at; as far as is possibly consistent with reason and justice, the several cases in judgment before them; for it is the office *Boni judicis ampliare jurisdictionem*, where the circumstances of the case so require.

Particular cases.

2. On motion for a discharge of the defendant's wife, who was taken upon an attachment for want of appearance, the case appeared to be thus, the defendant's wife being a widow and having a considerable fortune, on the defendant's application to her by way of marriage, proposed the settling her own fortune upon herself separately, wherewith he was not to intermeddle; and accordingly before marriage, a settlement was made and executed, and the marriage took effect. Some time after the husband being very much indebted was arrested, and the creditors proceeding to execution and to seize his goods, to prevent which, the wife gave a note, that if they would discharge the action, which was for 2000*l*. she would pay the debt out of her own estate; and accordingly the action was discharged; but she after refused to make good her agreement; so the bill was to enforce execution, and was against the husband and wife, and a *subpoena* was taken out against both, and actually served upon the wife at her house, but the husband could not be found; after which neither the husband nor wife appearing, an attachment was sealed against both, and the wife taken, and now she moved to be discharged, on several affidavits that her husband was actually gone to *Holland* before the filing of the bill; and so process against her without her husband was irregular, and that she ought to be discharged; and it was said that at law there could be no proceeding against the wife without her husband, and that equity followed the law in this particular. On the other side was said, that the wife in this case was not to be considered as a feme covert; that she having an estate settled on her before marriage, for her separate use, this made her a feme sole, and a separate person from her husband, and so her agreement binding on her; that they had done all they could to bring in the husband; that they had made him a party to the bill, taken out a *subpoena* against him and his wife, and for not appearing they have taken out attachments likewise against both; that if they could not in this case proceed against the wife, the justice of the court would be eluded, and it would be easy for any man to settle his estate upon his wife, and then get out of the way, and so bid defiance to his creditors. And Sir Joseph Jekyll (after master of the rolls) said, it was the saying of a very great man, *Est boni judicis ampliare jurisdictionem*, and he thought to extend the arm of justice further than usual, when otherwise there would be a failure of justice, was the duty of every court; that in some cases a
woman

woman may sue without her husband; and that nothing was more common than for a wife in this court, even to sue her own husband; and surely in this case the plaintiff ought not to lose the benefit of the wife's agreement, by her sending her husband abroad; and cited the case *Dubois* and *Dowle* to this purpose. But the lord keeper seemed to be of opinion, that the process in this cause without the husband was irregular, and that they ought to stay till the husband returned, when they might renew the process against both. To which it was answered, Suppose the husband should never return, must they then be totally deprived of the benefit of this agreement? On which my lord said, he would ask the master of the rolls's opinion, and be governed by that; and after the master of the rolls coming into court, was clear of opinion, that the process in this case without the husband was regular; that the husband was joined in the suit only for conformity, and said a woman by her marriage did not lose her discretion or understanding, but rather improved it by her husband's teaching, and cited *Moore* and *Hussey*, *Hob.* 93. where several cases are cited wherein a feme covert without her husband shall be chargeable, and said the practice of this court had been constantly so; on which the defendant prayed time till the first day of next term, to put in her answer, and on her entering her appearance with the register, and paying the costs of the motion it was granted, and she was discharged out of custody.

Note; In this case *Howe* moved, that the defendant ought not to be heard to move for her discharge, because she not having appeared by her clerk in court, was not at all in court, but a perfect stranger, and so could not regularly make an application by her counsel, till she had brought herself into court, by directing her clerk to enter an appearance for her; but of this no notice was taken, either by the court or counsel on the other side. *Gillb.* 83, 84. *Prec. Chan.* 328. *S. C.* Vide *Compleat Attorney* 326, 328.

3. Vide rule, *It is the office of temporal judges to advance laws made for religion, according to their end, though the words are short and imperfect.*

129. *Est quiddam perfectius in rebus licitis.*

General.

1. **S**O St. Paul, 1 Cor. x. 23. *All things are lawful, but all things are not expedient.* And this is finely spoken by Tully, *Est aliquod quod non oportet, etiamsi licet; quicquid vero non licet, certe non oportet.* *Hob.* 159.

2. A jointress restrained from committing waste. *Nelsf.* 190. The same of tenant for life, and ordered to repair the destruction he had made; tho' he was dispunishable of waste. *Nelsf.* 220, 221. *Prec. Chan.* 454. Tenant after possibility of issue extinct, and tenant for life, though by express grant dispunishable of waste, or by trust, shall be restrained from pulling down of houses or defacing a seat. 2 *Chan. Ca.* 32. *Gillb.* 127. *Salk. S.C.* A bill was preferred in favour of an infant *en ventre sa mere*, to restrain waste, and decreed, and an injunction was granted *inde.* *Prec. Chan.* 50. See *Barn.* 274. A patron may restrain an incumbent from waste, &c. *Barn.* 399, 400.

Particular cases.

3. See *Mildmay's case*, *Coke, lib. 1. 177.* a lease for 1000 years was disallowed, though a power was reserved to limit any estate for years, for any reasonable consideration, as to him should be thought good, yet the land was his own before. 4 E. 2. F. *Wast.* 11. A lease of an house and land, *et quod possit commodum suum inde facere meliori modo, quo sibi viderit expedire, sine contradictione aliqua*, yet he may not pull down the house; for there is nothing more contrary to liberty than licentiousness, nor to discretion than foolishness. *In maxima potentia minima licentia.* Hob. 159.

* 4. Though he was by express words dispunishable of waste, yet enjoined from cutting down timber, &c. which is either ornamental or a shelter to the family seat. *Packer and Lord Bolingbroke & al in Canc.* 15 March and 29 April 1726, and after affirmed in the house of lords, March 1728. See also case * *Lord Blaney and Mahon* before the house of lords, 27 March 1723.

* 5. A lease was with a penalty of 100*l.* for every acre ploughed or dug up. Lessee digs for gravel, and raises much more than the penalty, and submits in his answer to pay the penalty; but insists on payment thereof he is not to be enjoined from digging for the future; yet enjoined from digging any more for the remainder of the term. See case *Christ's hospital and Pugh*, before the house of lords, 20 March 1727.

130. *Eventus varios res nova semper habet.*

SEE the rule, *Periculosum est res novas et inusitatas inducere.*

131. *Every issue ought to consist of an affirmative and a negative.*

11 Co. 10. b.

132. *Every man's deed or covenant is to be taken most strongly against himself.*

General.

1. ALL contracts are to be taken according to the intent of the parties: and if there be any doubt, such interpretation must be made as is most strong against the grantor or obligor, that he may not, by dark obscure and uncertain wording of the contract, find away to evade it. * *Gillb.* 249, &c. Every unequal agreement is not fraudulent. See case before the house of lords, * *Lord Thomond and Hamilton, anno 1733.* Contracts are to be adjudged according to the law of the place where the same were made. See case before the house of lords, * *York Buildings Company and Meers*, 23 November 1728. Equity will not carry unequal agreements into execution. See case *Brain and Wooley*, before the house of lords, 9 Feb. 1721,

And * *Stop and Stanhope*, 24 March 1720. * *Tbompson and Harcourt*, 13 Feb. 1721, and * *Squire and Baker*, 27 Feb. 1726, all before the house of lords. Nor where a person of weak understanding is drawn into it. See case * *Carol and Chamberlain*, before the house of lords, 14 July 1721, also * *White and Leighbourn*, 28 Feb. 1722. Nor where the method of obtaining them is not strictly regular, though the same is in part executed. See case before the house of lords, * *Rochford and Nugent*, 22 May 1724. See also * *Fitzgerald and Uface*, anno 1733, for in agreements the ties ought to be reciprocal, *ibidem*. * An agreement to make a lease is a good lease in equity; and a confirmation of such lease by him in remainder is good; see case before the house of lords, *Lord Cater and Neagle*, 1 March 1717. *Dedi et concessi* may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, and it is in the election of the party to use it to which of these purposes he pleaseth. *Co. Lit.* 301. b. If a warranty be made to one, his heirs and assigns, by express words, the assignee shall take the benefit, and have a *warrantia cartae*. *Fitz. Na. Bre.* 135. 9 E. 2. *Garr, del Chartres* 30. 36 E. 3. *Tit. Garr.* 1. 4 H. 8. *Dv.* 1. 5 Co. 16. b. When divers do a trespass, the same is joint or several, at the will of him to whom the wrong is done, yet if he release to one of them, all are discharged; because his own deed shall be taken most strongly against himself; and if two men are jointly and severally bound in a bond, if the obligee release one, both are discharged. *Co. Lit.* 232. a.

Particular cases.

* 2. Covenants and agreements are to be considered most strongly against the party; as tenant for life, with power to make leases for 21 years, so the same be in possession and at the best improved rent, makes a lease, and a year after gives a note to another tenant under his hand, that he will renew his and the other's lease, so often as he shall be required: Decreed to renew at the old rent for 21 years, if he shall so long live. This decree was pronounced in the exchequer in *Ireland*, 21 Feb. 1736. and affirmed by the lords here. 17 Feb. 1738.

3. Baron and feme termors of an house in *Fleetstreet*, called *The three Conies*, for a long term of years. The husband alone makes a lease for part of the term, in these words, *The house or tenement in Fleetstreet, called The three Conies, with all the chambers, cellars and shops, &c. excepting and reserving to the husband by name, the shops propter proprium & solum usum et occupationem*. The baron died within the term, and the wife enters as to the shops upon the tenant, and is re-ousted, and brings ejectment, and the defendant pleads *non ejecit*. On motion for judgment for the plaintiff to recover his term in the shops, it seemed to *Weston*, that she ought to have it; for that the exception and reservation trenched upon all the lease, and the shops were not leased. *Sed Dyer contra*: For that it appears by the express words before, that the shops were leased generally; and this reservation or exception, is but special and temporary, (*viz.*) during the occupation and use of the lessor himself, according to 3 H. 6. 53. where the trees were not expressly excepted out of the lease, *sed quod bene liceret* to the lessor *succidere, dare et vendere arbores*, &c. *Item nota supra*, the exception and reservation is made to the husband lessor by name only, without saying to his executors or assigns, &c. *Item nota*, the exception of the

the shops, is of all the shops, which is contrary to the lease itself; and therefore is a void exception. *Et sic fuit opinio aliorum justitiariorum tandem.* Dy. 264. b.

4. Tenant in fee makes a lease of lands to B. to have and to hold to B. for life, without mentioning for whose life, it shall be taken to be for the life of the lessee; for it shall be taken most strongly against the lessor. *Co. Lit.* 42. a.

* 5. Covenant to grant a new lease at the end of the term, under the same rents and covenants; the new lease shall be likewise with covenants to renew, &c. See case before the house of lords, *Bridge and Hitchcock*, 24 June 1716.

* 6. The earl of Godolphin agrees with builders before the act made for the building of *Blenheim* house at the expence of the crown; and recites that he made such agreement at the instance and desire of the duke of *Marlborough*; the duke is bound by such agreement, and as well liable to pay for the work done after the statute as before. See case *Duchess of Marlborough and Strong*, before the house of lords, 8 May 1721.

7. In covenant the plaintiff declared, that the defendant and J. S. *convenērunt pro se et quolibet eorum*, that they or either of them would load such a ship, and pay for the freight, &c. The defendant pleaded in abatement, that other covenantors were in full life, and not named, and prayed judgment of the writ: and it was agreed by all, that *obligamus nos et utrumque nostrum* in a bond is joint and several. *Sed per Holt* chief justice, there is a diversity between A. and B. *conveniunt et quilibet eorum convenit*, and A. and B. *conveniunt pro se et quolibet eorum*; for in this first *quolibet eorum convenit* expressly severs the lien, but *pro quolibet eorum* seems to go to the thing to be done, that is, that they both or either of them would do it. *Sed reliqui justic' contra*, and judgment was, that the defendant should answer over. *Salk.* 393.

8. If one grant a rent-charge to another out of his lands, the grantee hath two remedies; either by way of distress or writ of annuity; for the grantor having granted it, he hath charged his person, and having granted it out of his lands, he hath charged his lands also; and having thus granted two remedies, it must be in the election of the grantee, who is to have the advantage of these remedies, which he will have. *Gilb.* 250.

9. In the case *Hill and Grange*, (*Plow.* 172.) if a man make a lease for years, and reserve a rent payable at *Michaelmas* and *Lady-day*; and there is a condition, if the rent be behind, and unpaid at the said feasts, and ten days after, that the lessor may re-enter, the construction of such lease has been, that the rent is due at the day, so that the lessee may distrain for it, though to save the condition the lessee may tender it at the last of the ten days, because those are days of grace given by the condition, that he may save his estate by the tender. *Gilb.* 250.

* 10. The case was (1 *Vent.* 58.) that the condition of a bond was, that the obligor should bring the son and daughter of J. S. at their full age, to give such release as a third person shall require; the defendant pleads that the son is alive, and under age, whereto the plaintiff demurs, and the demurrer is allowed; for the force of the bond is not suspended till they are both of age; because it is to be taken not conjunctively, but respectively and disjunctively; for the obligor undertakes, that the daughter shall release

at

at her full age as well as the son; and if she does not the condition is broken. *Gilb.* 250.

11. There is a resolution in the case *Sayer and Gleane*, (1 *Lev.* 54, 55.) in debt on an obligation, that if a ship put to sea, and either the goods or the obligor come safe, he should pay such a sum, over and above the use allowed by the statute; the defendant pleaded that the obligor died before he returned; and it was objected, that the defendant had an election to pay at which of the contingencies he would; and therefore the executors of the obligor were excused, because their testator never returned safe; but it was resolved that the law supplies the words, *which should first happen*, and no prejudice to the executors of the obligor; because it was the sense of such contract, that payment should arise on either of the contingencies. *Gilb.* 250.

12. See *Gilb.* 48. 1 *Pe. Will.* 9. 1 *Vern.* 21, 22, 28, 48, 141. 2 *Lev.* 9. 1 *Mod.* 175. 1 *Vent.* 137. 1 *Vern.* 167, 449. 1 *Chan. Ca.* 119, 120, 196, 197, 210. 2 *Chan. Ca.* 211, 212. 4 *Co.* 26, 27. *Co. Lit.* 99. a. 287. *Hob.* 168, 169, 170, &c. *Poph.* 182. 2 *Bulst.* 258. *Skin.* 60. *Sid.* 48. 3 *Cro.* 26. *Saund.* 284. 2 *Lev.* 80. 3 *Lev.* 283. *Lat.* 233. 1 *Inst.* 112. b. 1 *Leon.* 276, 279. 4 *Leon.* 27. *Rol. Abr.* 15. *Dy.* 318. *Co. Lit.* 183. a. 1 *Co.* 154. a. b. *Farest.* 158. *Dy.* 97.

13. *Vide* rules, *Constructio legis non facit injuriam*. *Quaelibet concessio fortissime contra donatorem interpretanda est*. Contracts are to be taken according to the intent of the parties, expressed by their own words. In things of elections, the party is to shew that he hath made it. *Expressio eorum, quae tacite insunt, nihil operatur*, &c.

133. Every man is to recover by his own strength, and not by the weakness of his adversary's pretensions.

1. **I**N *Quare Impedit*, if any thing in the count be traversed, it must be such part as, if true, is inconsistent with the defendant's title, and if false or found against the plaintiff, doth absolutely destroy his title. Nay, if the traverse leaves no title in the plaintiff, it is good enough, whatsoever becomes of the defendant's. *Show. Parl. Ca.* 221.

2. In the case of *The bishop of Worcester and Jervis*, in *Vau.* 53. it is said, That the king ought to maintain his own, and not to question the defendant's title; he cannot desert that which he hath alledged for himself, and fall upon the defendant's title: if the right be not his, he has no cause to complain of the defendant, though another hath right. *Every man is to recover by his own strength, and not by the weakness of the defendant's pretensions.* *Parl. Ca.* 221.

* 3. *He, who recovers, must recover on the strength of his own, and not on the weakness of his adversary's title.* And it is sufficient to the defendant that the plaintiff hath no title appearing. See case before the house of lords, *Burgh of Perth and Presbytery* there, 5 March 1729-30.

134. Every one ought *sic uti suo ut alienum non laedat*.

General.

1. **I**N an house, four things are to be desired, *Habitatio hominis, delectatio inhabitantis, necessitas luminis, et salubritas aeris*. And for all or any of these being interrupted, an action lieth, and damages shall be recovered; but for prospect, which is only a matter of delight, and not of necessity, no action lieth; and yet it is a great commendation to an house if it have a long and large prospect, *unde dicitur, Laudaturque domus, longos quae prospicit agros*; but the law does not give actions for such matters of delight. And Solomon says, *Eccl. xi. 7. Dulce lumen est, et delectabile oculis videre solem. Et olim (ut Plutarch) rex Aethiopum interrogatus quid optimum? Respondebat lucem, &c.* And if stopping of wholesome air be a good cause of action, *a fortiori* the corruption of the air, as was the case at bar, must needs be a good cause and foundation for an action; for the rule is, *Prohibetur ne quis faciat in suo, quod nocere possit alieno. Et sic utere tuo ut alienum non laedas.* 9 Co. 58. Aldred's case.

Particular cases.

2. Aldred brought case against Benton, for that the plaintiff being seised of an house and land, the defendant, having a little orchard contiguous, interrupted his lights by an erection, &c. and rendered the air unwholesome by building of an hog-sty and keeping hogs, &c. and on *non culp.* pleaded, he was found guilty of both, and damages assessed; and on motion in arrest of judgment, that the action lay not, for that the erection of the hog-sty was necessary for the sustentation of man, and one ought not to have so delicate a nose as not to endure the savour of hogs; for *Lex non favet delicatorem votis*. Yet it was resolved the action lay; for in an house, four things are desirable, *ut supra*. 9 Co. 57. Aldred's case.

3. Thomas Bland brought case against Mosley, and declared that James Bland was seised, &c. and that he and all those, &c. time whereof, &c. have had and used to have for them and their tenants, &c. on the West part of the said house seven windows to a piece of ground adjacent, which piece of ground time whereof, &c. was without any building. By means of which windows the said James and all those, &c. are used time whereof, &c. for them and their tenants to have several wholesome and necessary easements and commodities by reason of open air and light, &c. and that the said James demised to the plaintiff; and that the defendant mischievously intending to deprive him, *et obscurare mesuagium praedictum horrida tenebritate*, &c. had erected a new building upon the said piece of land, &c. so close that the said lights were stopt, by which the plaintiff lost his easements, &c. *et maxima pars mesuagii praedicti horrida tenebritate obscurata fuit*, &c. the defendant pleaded in bar *quod infra praedictam civitatem Ebor. talis habetur, et a toto tempore cujus, &c. habebatur consuetudo, (viz.) quod si quis habuerit fenestras ad visum per easdem versus terram vicini sui, vicinus ille visum illar' fenest' obstruere super terram illam solebat et posset, sicut melius viderit sibi expedire*, by force of which custom he justified the stopping of the windows; upon which the plaintiff demurred in law. And adjudged the bar was insufficient for two causes, 1st, When a man hath a

lawful easement by prescription, another custom immemorial may not take it away, for the one custom is as ancient as the other. As if one man has a way over the lands of another by custom, the other may not prescribe to stop the said way; for in both this and the principal case the prescription or custom might have lawful commencement. 9 Co. 58. a. b.

4. *Wray*, chief justice: For stopping as well of the wholesome air as of light, an action lieth, and damages shall be recovered for them, for both are necessary; for it is said *vescitur aura aetheria*: and the words *borrida tenebritate*, &c. are significant and imply the benefit of light. But he said that for prospect, which is only matter of delight and not necessary, no action lieth. 9 Co. 58. b.

5. Levying a brick-kiln or a lime-kiln, is good and profitable, yet if erected so near an house, that when it burns, the flames of it so enter the house that it cannot be inhabited, an action lieth. So if one hath a water-course near his house for his necessary uses, if a glover levy a lime-pit for calves-skins and sheep-skins, so near this water-course, that the corruption of the lime-pit corrupts it so that the tenants go away, case lieth; as was adjudged 13 H. 7. 26. b. and this standeth well with the rule, *Prohibetur ne quis faciat in suo, quod nocere possit alieno*, &c. 9 Co. 59. a.

6. *Vide lord Coke's Entries*, tit. *Nuisance*, fo. 406. b. He, who hath a several piscary in a water, shall have case against one for erecting a dye-house, *per quod proficuum piscariae suae praedictae totaliter amisit*, &c. so in the principal case for erecting the swine-sty, &c. 9 Co. 59. a.

7. *Vide Cro. Ca.* 510. 1 *Roll.* 88, (40.) 5 Co. 57, &c.

135. Every rightful fee-simple is either by purchase or descent.

General.

1. EVERY man, who hath a rightful fee-simple, hath it either by purchase or descent. But one may be in of a wrongful estate by disseisin, intrusion, abatement, usurpation, &c. *Co. Lit.* 2. a.

2. Every man who hath a lawful estate in fee-simple, hath it either by descent or purchase. *Co. Lit.* 13. b. 14. a.

Particular to

Purchase.

3. Purchase is when one cometh to lands by conveyance or title. And disseisins, abatements, intrusions, usurpations and such like estates gained by wrong, are not said in the law to be purchases, but oppressions and injuries. *Co. Lit.* 3. b.

4. A purchase is always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or freely of gift, for that is in law also a purchase. *Co. Lit.* 18. a. b.

Descent.

Descent.

5. A descent, because it cometh meerly by act in law, is not said to be a purchase. *Co. Lit.* 18. *a. b.*

6. Descent in legal understanding is taken when land, &c. after the death of the ancestor, is cast, by course of law, upon the heir; and this is the noblest and worthiest means whereby lands are derived from one to another; because it is wrought and vested by the act of law, and right of blood, to the worthiest and next of blood and kindred of the ancestor; and therefore it hath not in the common law altogether the same signification that it hath in the civil law; for the civilians call him *Haeredem, qui ex testamento succedit in universum jus testatoris*; but, by the common law he is only heir, who succeedeth by right of blood. And this agreeth well with the etymology of the word *heir*, to whom the lands descend; for *haeres dicitur ab haerendo, quia qui haeres est haeret, hoc est, proximus est sanguine illi cujus est haeres*; so as he that is *haeres, sanguinis est haeres, et verus haereditatis*. Now as descent is the worthiest means to come to lands, &c. so hath the heir more privileges than any that by other order or means come to lands, &c. *Co. Lit.* 237. *a. b.*

136. *Exceptio probat regulam.*

* 1. By lord chancellor: The exception is to be construed as the general clause, out of which the exception is taken. *Exceptio probat regulam de rebus non exceptis*. And if an exception shall have that effect to explain the general clause out of which the exception is taken, it is reasonable that the general clause should have this effect to explain the exception likewise. *Wingfield versus Newton, in Canc.* 6 Feb. 1729.

2. Vide *Co. Lit.* 9. *a. b.* 2 Roll 99.

137. *Exceptio unius est exclusio alterius.*

* LORD chancellor: As the specialty debts amount to more than the legacy in question, and as the personal estate has been exhausted in the payment of them, the plaintiff must be intitled to stand in the place of such specialty creditors, and so to receive a satisfaction out of the real estate. His lordship also said, that legacies are acts of bounty, and the natural fund for the payment of them is the personal estate only. His lordship also said children are considered in this court, as being in some degree creditors by nature. *Corefield and Lingen, in Canc.* before lord chancellor, 3 March 1739.

138. *Ex diuturnitate temporis omnia praesumuntur solemniter esse acta.*

1. IF all the witnesses to a charter of feoffment be dead, the violent presumption, which standeth for a proof, is continual and quiet possession; for *Ex diuturnitate temporis, &c.* also the deed may receive credit
per

per collationem sigillorum, scripturae, &c. et super fidem cartarum mortuis testibus erit ad patriam de necessitate recurrendum. Co. Lit. 6. b.

2. See 2 Ju. Eccl. 464, 465, 466, 467, 480, 483.

3. See also rule, *Omnia praesumuntur solemniter esse acta.*

139. *Executio juris non habet injuriam.*

1. **I**T was resolved, that forasmuch as in the case at bar a *Capias* was awarded against the countess of *Rutland*, by the court of common pleas, that the sheriff, or his officer by his warrant, might without any offence execute it; for they are not to dispute the authority of the court, but to execute the warrants to them directed, whereto they are sworn; and though it appeared in the *Capias*, that she was a countess, against whom, by the law in such case, no *Capias* lay, *et ignorantia juris non excusat*, and principally sheriffs and other ministers of law and justice, as was objected; yet forasmuch as in some cases, as in cases of contempt, &c. *Capias* lies against them; therefore it was resolved, that the sheriff and his ministers ought not to examine the judicial acts of the court, but to execute the writ: wherewith agreeth the opinion, 36 H. 8. Dy. fo. 60. If a *Capias* or *Exigent* come to the sheriff against a duke, earl, &c. in case where it doth not really lie against them, yet he ought to serve the writ, and not to dispute the validity thereof. But the truth of the case of the countess of *Rutland* was, that the serjeant who had the warrant to arrest the countess on the said *Ca. Sa.* being apprehensive that she would be rescued by her servants and dependants, &c. whereby the sheriff might be charged, the serjeant at mace advised S. the plaintiff in the suit, to enter a feigned action for 1000*l.* before the sheriffs of *London*, according to the custom there, whereupon they would first arrest the countess, and by force thereof bring her to the *Compter*, and then take her body in execution upon the *Ca. Sa.* Hereupon the serjeant, with many more, came to the countess in her coach in *Cheapside*, and shewing her the mace, and touching her body with it, said we arrest you, Madam, at the suit of S. which were all the words they said to her, but compelled her coachman to drive her ladyship to the *Compter* in *Woodstreet*, at the door of which, the sheriff came, and brought the countess to his house, where she remained seven or eight hours, till she actually paid the debt. It was resolved, that the sheriff, or any other by his authority, who arrested another person, ought, upon the arrest, to shew at whose suit, out of what court, for what cause, and when the process is returnable; to the intent, if it be for any execution, he might satisfy it, and free his body from the arrest, if he so pleased; and if it came upon mean process, either to agree with the party, or put in bail, and know when he was to appear. And as this case was circumstanced, it was resolved, that the said general arrest could not be said to be by force of the *Ca. Sa.* and that the arrest of the said countess by the said serjeant at mace of their own heads, and without other warrant, was against law, and the said countess falsely imprisoned. And so in summons in real actions, &c. Vide 3 E. 3. 48. 43 E. 3. 32. 50 E. 3. 16, &c. And a severe sentence was given against S. the serjeant, and other their confederates. And the entry of such feigned actions in *London* were all utterly condemned by the whole court; for by colour of law and justice, they, by such feigned means, acted against both

both law and justice, and so made law and justice the author and cause of tort and injustice. *Vide Stat. 5 H. 4. c. 8. in the preamble. 6 Co. 52. The countess of Rutland's case.*

2. Held if a man bring an action on a false surmise, in a proper court, the defendant cannot bring an action against him and charge him with it as a fault directly and *ex diametro*, as if the suit itself were a wrongful act; for *Executio juris non habet injuriam*. The law is good, but the abuse of it is the fault. *Hob. 266.*

3. If one be imprisoned upon a formal suit, though there was no good cause of action, yet if he give bond for his release, he shall not avoid it by duress; for it was by law, though the plaintiff untruly procured it. *Hob. 266, 267.*

4. But if you charge me with a crime in a court which is no way capable of the cause, I may have an action, and lay that very complaint to be the slander; *aliter*, if in a proper court. *Hob. 266, 267.*

5. Now to the principal case, if one sue me in a proper court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have case against him for the undue vexation and damage he hath put me unto by his ill practice, though the suit itself be legal, and I cannot complain of it, as it is a suit; and therefore, *16 E. 3. Fitzb. Deceit 35.* A cognizor of a statute sued execution against his deed of defeasance, whereupon the cognizor had deceit. *Hob. 267.*

6. If a man sue me, and pending that suit, commence another against me, to this I have a plea in abatement which proves the latter suit unjust, and vexatious: But if he discontinue the former, he may bring a new action. *Hob. 267.*

7. Likewise I may have case against him, who sues me against his own release, or after the money duly paid; yea, though it be upon a single obligation. *Hob. 267.*

8. So where one bargains and sells his land at common law, and refuseth to make assurance, and conveys it to another with notice, the first bargainee may have an action upon the case, or deceit, as well as a *subpoena*. *Hob. 267.*

9. But two cautions are to be observed to maintain actions in these cases. 1st, That the new action must not be brought before the first determined; because it cannot sooner appear that the first was unjust; which is the reason given by the judges, *2 R. 3.* And that is the reason that a writ of conspiracy lieth not till the plaintiff be lawfully acquitted. 2dly, The other rule is, that there must not only be a thing done amiss, but also a damage already fallen upon the party, or else inevitable. *Hob. 267.*

10. And therefore *19 H. 6. 44.* if a man forge a bond in my name, I can have no action upon the case yet, but when I am sued I may, for the wrong and damage, though I may avoid it by plea. But if it were a recognizance or fine, I may have deceit presently, before execution; for *Quae incontinenti, vel certo fiunt, inesse videntur.* *43 E. 3. 20.* Deceit against one who procured a *formedon* by collusion. *Hob. 267.*

11. *Hob. 320. Doct. & Stud. lib. 2. cap. 47.*

12. *Vide rule, Est quiddam perfectius in rebus licitis. Ignorantia facti excusat. Liberty the greatest jewel.*

140. *Executor, where rightful, there can be no executor de son tort.*

1. **T**HE plaintiff being the widow of *A.* sued the defendant, who was his executor, for satisfaction for several debts of the testator's, which she, having possessed herself of his estate, had paid; the executor having gotten all the estate out of her hands. It was much controverted, whether she should be holpen herein? For though executor of his own wrong shall be allowed all payments made to any but himself, yet she was not executor of her own wrong; for where there is a rightful executor, as here, there can be no executor *de son tort*. Yet it resembled that case; and the court doubting much what to do in this case, decreed, by consent of counsel, that she should be allowed for all payments which she had made and were incumbent on the executor to pay, according to the course of law: but that if she had made any payments out of the order and rule that the law left the executor liable to, such payments she should not be allowed for, if they were to the prejudice of the executor. 1 *Chan. Ca.* 33.

2. As to charging one as executor *de son tort* in the courts of common law; Lord chancellor said, The manner is not to charge them, that they were executors of their own wrong, for that was held once to be bad, but they must be charged as executors *testamenti et ult' voluntatis*; neither is there any way to charge executors *de son tort* in the ecclesiastical court, but the remedy is for the administrator *de bonis non*, to commence a suit in equity upon the foot of a breach of trust and fraud, and as to an appeal being a proper remedy, his lordship said, that in my lord *Holt's* time an executor was sued in the ecclesiastical court for an account by a person who was neither creditor nor legatee; and it was objected thereunto, that an appeal was the proper remedy; but the court there said he had been called into a jurisdiction which had not proper cognizance of the matter; wherefore they granted a prohibition; the rest of the court were of the same opinion with my lord in the particular case, and accordingly the rule was made absolute. 2 *Ju. Eccl.* 79, 80. case *Tucker and Towel*.

141. *Ex facto jus oritur.*

1. **A** Woman was removed by two justices from *O.* to *C.* thence by two justices to *B.* and she voluntarily returned to *O.* and there bears a bastard child. *Note*; It was not said in the first order that the two were justices. *Holt*, chief justice, It should be said that they were justices and (*Quor. unus*) though the *Quorum* is often omitted; for it is a special authority out of sessions. It is said she came to settle contrary to law, but they should state the fact, not the law; for *Ex facto jus oritur*. If there be any fraud in conveying a woman to bear a child in any parish, yet the child may be sent with its mother, to the place of her last settlement. The case was referred to the judges of the assize. *Comb.* 285, 286.

2. *A*

2. A decree ought to be grounded on fact, *Ex facto jus oritur*, else by the clerk's course the defendant should be barred of review in all cases; for the plaintiff in a bill of review cannot alledge fact contrary to what is stated in the decree to be proved, &c. 2 Chan. Ca. 162.

142. *Ex malis moribus bonae leges natae sunt.*

1. IF we look into our own history we shall find, if the laws of provision and *praemunire* had not been made, these realms had lost the name of imperial, and of kingdoms too, and had been long ago made tributary provinces to the bishop of Rome; or rather part of St. Peter's patrimony in demesne; our kings had had their scepters wrested out of their hands, their crowns spurned from their heads, their necks trode upon, and made lacquies or footmen to the bishop of Rome, as some emperors and French kings have been; our prelates been made his chaplains and clerks, our nobility his vassals and servants, our commons his slaves and villains, if these acts of manumission had not freed them, &c. Dav. 85. a. b. 86, 87. b. 88. a. b. to the end.

It was a great blasphemy when the devil said, I will ascend and be like the highest; but it is still greater blasphemy to personate God, and bring him in, saying, I will descend and be like the prince of darkness: and what is it better, to make the cause of religion to descend to the cruel and execrable actions of murdering princes, butchering people, and subverting of states and governments? Surely this is to bring down the Holy Ghost, instead of the likeness of a dove, in the shape of a vulture, and to hang out of the bark of a Christian church, a flag of pirates and assassins. *Ira hominis non implet justitiam dei.*

2. See 1 Ju. Eccl. Divisions, The course of ecclesiastical usurpations; the opposition the same have met with throughout, and the several statutes provided against such encroachments.

143. *Ex nuda submissione non oritur actio.*

General.

1. STAT. 9 & 10 W. 3. cap. 15. sect. 1. after 11 May 1698. all merchants and others, desiring to end any controversy (for which there is no remedy but by personal action or suit in equity) by arbitration, may agree that their submission of the suit to the award or umpirage of any persons, shall be made a rule of any of his majesty's courts of record, which the parties shall chuse, and may insert such their agreement in their submission, or the condition of the bond or promise, and on producing an affidavit of such agreement, and upon reading and filing of such affidavit in the court so chosen, the same may be entered of record in such court, and a rule of court shall be thereupon made, that the parties shall submit to, and finally be concluded by such arbitration or umpirage; and in case of disobedience thereunto, the party neglecting or refusing shall be subject to all the penalties of contemning a rule of court, and process shall issue accordingly; which shall not be stopt or delayed by any order, &c. of any other court either of law or equity, unless it appear on oath, that the arbitrators and umpires misbehaved themselves, and that such award was corruptly

corruptly or unduly procured. *Sect. 2.* Any arbitration or umpirage procured by corruption or undue means; shall be void and set aside by any court of law or equity, so as such corruption or undue practice be complained of in the court where the rule is made for such arbitration, before the last day of the next term after such arbitration made and published to the parties. *Cay's Abr. Stat. tit. Arbitration.* See rule, *Quae non valent singula, juncta juvant.* *Case Giffard and Vaux.*

2. *Vinyor* brought debt against *Wylde* upon a bond of 20*l.* of arbitration, in which case three points were resolved. 1st, That though *Wylde* was bound in an obligation, *to stand to, abide, observe, &c. the rule, &c. arbitrament, &c.* yet he might countermand it; for a man may not by his own deed raise such an authority, power or warrant not countermandable: as if I make a letter of attorney to make livery, or sue an action in my name, or assign auditors to take an account, or make a factor, or submit myself to an arbitrament, though they are by express words irrevocable, yet they may be revoked. So if I make my last will and testament irrevocable, yet I may revoke it; for neither my act nor words can alter the law, and make that irrevocable which in its own nature is revocable; whether it be by bond or otherwise that the submission is made, the authority of the arbitrator may be revoked or countermanded: but then in the one case he forfeits his bond, though in the other he loseth nothing; for *ex nuda submissione non oritur actio.* 2dly, It is not material to the plaintiff to aver, that the arbitrator had notice of the countermand; for it is implied in the words *revocavit et abrogavit omnem auctoritatem, &c.* for *sans* notice it is no revocation or abrogation of the authority; and therefore if there was not notice, the defendant might join issue, *Quod non revocavit, &c.* and if there was no notice, it shall be found for the defendant, *&c.* 3dly, It was resolved, that by this countermand or revocation of the power of the arbitrator, the obligee may take advantage of the obligation; for two causes, 1st, Because the obligor hath broken the words of the condition, which are, *that he should stand to and abide, &c. the rule, order, &c.* and when he countermands the authority of the arbitrator, *he doth not stand to and abide, &c.* which were put into the condition with intent that no countermand should be, but that it should be finished by the arbitrator, and that his power should endure till he had made an award. And when the award made, then are these words to compel the parties to perform the same, *viz. observe, perform, fulfil, and keep the rule, order, &c.* 2dly, The other reason is, that the obligor, by his own act, hath made the condition of his bond, which was made to save him from the penalty thereof, impossible to be performed by him. 8 Co. 80. *Vinyor's case.*

Particular cases.

3. The bill was for relief against an award submitted to by parties, and bonds for performance; the court would neither establish or affirm, nor overturn the award; unless circumvention, fraud or corruption; *aliter* if it had been by order of the court. 3 Rep. Chan. 89. *Vide* 82.

4. One of the parties to an award having made a submission in court, pursuant to the late act of parliament, dies before the money paid. No *Sci. Fa.* can issue against the heir or executor, to enforce payment; for the award, though established by the court, is not in nature of a judgment or

or decree to be prosecuted, but of a contempt which dies with the person. So held all the judges, they being consulted in this matter, as a matter concerning all the courts. *Proc. Chan.* 223.

5. On a bill of review to reverse a decree which confirmed an award, the party had not assented, tho' the submission was by order of chancery, and the solicitor assented and attended by counsel and himself, yet as the party's assent did not appear, though the decree was signed and inrolled, the court reversed it. *1 Rep. Chan.* 195.

6. An award was by private submission without order of court, and cross bills were, one to establish it, and the other to be relieved against it. Both bills dismissed and sent to law. *2 Rep. Chan.* 34, *et ante* 30. *1 Vol.* 86, 141, &c. *3 Vol.* 20. *Eq. Abr.* 80.

7. A voluntary award decreed, being assented unto, and in part executed. *3 Rep. Chan.* 304.

8. An award was, that one party submitting should have such lands, not mentioning his heirs. Yet this award having been long made, and three of the four arbitrators (the fourth being dead) having certified their meaning to be, that he should have the inheritance to him and his heirs; Decreed accordingly. *1 Rep. Chan.* 85.

9. The court would not set aside the award on account of any hardships therein, because the arbitrators were judges of the parties own chusing, and the plaintiff had notice, and might have been heard, had he pleased. So the bill was dismissed with costs. *2 Mod. Ca.* 63, 64.

10. A bill was to have the benefit of an award. The defendant demurred, for that he ought to seek remedy at law. Demurrer over-ruled. *2 Rep. Chan.* 30, 39.

11. If one party performs an award, equity may compel the other thereto. But if a perpetuity be awarded, it is against the course of chancery, and void. But the defendant is not bound to discover any thing to subject himself to the penalty of the bond, being under litigation at law. *1 Rep. Chan.* 142.

12. Vide *1 Rep. Chan.* 85, 86, 141, &c. *3 Rep. Chan.* 10. *Eq. Abr.* 80. *Max. Eq.* 53 to 60. *2 Rep. Chan.* 24, 366. *Eq. Abr.* 39, 41. *2 Rep. Chan.* 28, 304, &c. 68, 69. *3 Rep. Chan.* 17. *1 Chan. Ca.* 40. *1 Rep. Chan.* 195. *1 Chan. Ca.* 86. *Salk.* 70. *1 Rol. Abr.* 268. *Mar.* 111. *Sty.* 351. *3 Lev.* 17. *2 Mod.* 227. *1 Vern.* 259. *3 Rep. Chan.* 76. *1 Rep. Chan.* 198.

144. *Ex paucis dictis intendere plurima possis.*

SEE *Lit. sect.* 384. and *Co. Lit.* 237. a.

145. *Expedit reipublicae ut sit finis litium, propter communem omnium utilitatem.*

1. IF a man be disturbed of a common or way, or a ditch be made overthwart it, that he cannot pass, yet he shall not have an action of the case; and this the law provideth to prevent multiplicity of suits; for if any one man might have an action, the consequence would be, all men

might. Yet the law for this nuisance hath provided an apt remedy, (*viz.*) presentment in the leet or torn, unless where a man hath a particular damage; as if he and his horse fall into the ditch, whereby he receiveth hurt and loss; for this special damage, which is not common to others, he may have an action upon his case; as was resolved by the court of king's bench, 27 H. 8. in which case it was said, that it had been adjudged in that court between *Westbury and Powell*, that where the inhabitants of *Southwark* had, by custom, a watering place for their cattle, which was stopt up by *Powell*, that in that case, any inhabitant of *Southwark* might have an action; for otherwise they should be without remedy; because such a nuisance is not presentable in the leet or torn. Note the diversity, says lord *Coke*, because it is not a common nuisance to all the king's subjects; and what is not so to all, is not presentable in the leet or torn. *Co. Lit.* 56. a. 9 Co. 113. a.

2. A copyholder having right to common may have his action of the case against a stranger, for putting his cattle to depasture there; for he might take them for damage feasant, as is held 24 E. 3. 42. 46 E. 3. 23. 15 H. 7. 2 and 12. which proves it to be a wrong, and damage done to him, &c. and it is no answer to say, then every other commoner might have his action too for the same cause; and so actions for small offences be multiplied, as in *Williams's case*, 5 Co. 72. of a common chapel or church, an action lieth not for non-performance of divine service; nor for a common nuisance in the highway, &c. 2. If the commoner hath freehold in his common, and the lord, or any other, will depasture, &c. he may have assise. And by consequence, in the case at bar, the commoner having but common at will by copy, shall have case, &c. 9 Co. 112. b. 113. a. b. *Vue le case et note bien plus excellent matter.*

3. Public nuisances shall only be punished and reformed at the suit of the king; for they may not be reformed at the suit of any private person; for the damages are not private but public. But *privatum damnum sive nocumentum* shall be reformed by action of any private person grieved. But *commune nocumentum* at the suit of the king, who is the head of all the commonwealth. But trespasses done to several commoners is *privatum*, and not *commune nocumentum*; and so adjudged in 27 Aff. pl. 6. Presentment was in the leet, that J. N. had inclosed such lands, which ought to be in common for all the inhabitants of the vill, &c. *ad commune nocumentum inhabitantium villae praedictae*, and this presentment was adjudged void; for it is a private and particular tort to the particular inhabitants of this particular vill, and no public or common nuisance, &c. 9 Co. 113. a. b.

4. Vide 5 Co. 101. 2 Cro. 491. Syd. 34. 2 Ju. Eccl. 493, 494, 495.

5. Vide rule, Equity will prevent multiplicity of suits.

146. Expressio eorum quae tacite insunt nihil operatur.

General.

1. **T**HOUGH the law says, that when a man grants lands he grants the underwoods inclusively; and so when he grants his house he grants all the several rooms in it; yet in 33 & 34 Eliz. B. R. *inter Kenisham and Redding*, the queen leased the parsonage of *Greenwich*, with all

the woods and underwoods expressly thereunto belonging (*exceptis omnibus grossis arboribus; boscis et maëremiis*); the opinion of the court was, That the exception, as to underwoods, was void. But they held, that the exception was only to be extended to great woods. So in the case 9 *Eliz. Dy. 264.* which proves that the rule, *Expressio eorum quae tacite insunt nihil operatur*, is to be understood, having respect to itself only, and not having relation to other clauses. *Hob. 170.*

Particular cases.

2. One having but one close in *D.* demiseth all his lands in *D.* (excepting that one close) the exception is void, &c. *Hob. 170.*

3. If *A.* grants 20s. rent in his manor, (*viz.*) by the hands of one so much, and of another so much; and the tenants assigned are but at will, the whole manor is charged; for the (*viz.*) being of no effect, cannot frustrate the premises, which are sufficient of themselves. *Hob. 172.*

4. If a man hath lands in an hamlet, and other lands in another part of the town; if he grant his land in that town, (*scil.*) in the hamlet, no more will pass. But if he grant all his lands in the whole town, (*viz.*) in the hamlet, all the lands will pass, and the (*viz.*) is void. *Hob. 173.*

5. By a grant of trees by him in fee-simple, they are absolutely passed from him and his heirs, and vested in the grantee, and go to his executors or administrators, being in understanding of law divided as chattels from the freehold; and the grantee hath power incident to, and implied in the grant to sell them when he will, without any other special licence, &c. *Hob. 173.*

6. A devise of the profits of the inheritance gives power to sell, &c. 1 *Chan. Ca. 240.*

7. If the king in his grant recites, that another holds the manor of *D.* for his life, and granteth the same manor to *B.* for his life; in this case the law implieth, that the second grant shall take effect or commence from and after the determination of the first. 8 *Co. 56. b.*

8. A copyholder deviseth to *J. S.* for 20 years after the death of his wife, to raise portions for younger children; here as the devise is to a stranger, in the mean time it shall descend to the heir. But had the devise been to the heir, then an estate would have arisen to the wife by implication. 1 *Vern. 22.*

9. One seised of a copyhold surrenders to the use of his will, by which he saith, my debts and legacies being first deducted, I devise all my estate, both real and personal, to *J. S.* Lord chancellor: This shall amount to a devise to sell for payment of his debts. 1 *Vern. 45.*

10. Where there is an express estate limited, no implication ought to be admitted to controul it. *Expressum facit cessare tacitum.* *Bamfield and Popham's case, 1 Pe. Will. 56.*

11. Resolved, There being an express estate given to *Popham* for life, the remainder to his first and every other son, &c. the words [*if Popham should die without issue male*] should not enlarge the estate; in regard these amounted only to make an estate-tail by implication, and words of implication will never destroy what was before expressed. 1 *Pe. Will. 55.*

12. Vide *Pal. 437.* 1 *Pe. Will. 79, 84.* *Doct. & Stud. lib. 2. cap. 20.* *Cro. Eliz. 702.* *Dy. 77.* 5 *Mod. 29.* *Mo. 26, 29.* *Yelv. 94.* *Hard. 4.* *Pal.*

Pal. 508. *Saund.* 284. *Prec. Chan.* 39, 44, 181. 1 *Chan. Ca.* 32, 249. *Nels.* 195, *S. C.* *Hob.* 170. *Barn.* 304.

13. See rules, *Designatio unius personae est exclusio alterius. Expressum facit cessare tacitum.* Condition none may take advantage of, but who is either party or privy to it. Every man's deed or covenant to be taken most strongly against himself.

147. *Expressum facit cessare tacitum.*

IF the condition of a mortgage be, that if the feoffor pay to the feoffee, or his heirs, such a sum at such a day, &c. there, after the death of the feoffee, where he dieth before the day, payment ought to be made to the heir. *Lit. sect.* 339. So he cannot pay the money to the executor; for, as *Lit.* saith in this case, the payment ought to be to the heir, *Et hoc casu, designatio unius personae est exclusio alterius. Et expressum facit cessare tacitum.* And the law shall never seek out a person, when the parties themselves have appointed one, &c. *Co. Lit.* 210. a.

148. *Favendum est ecclesiae quam parsonae.*

1. **T**HE king's temporal courts by his immediate authority have power derived from him, to suspend the proceedings of the ecclesiastical courts by prohibition, &c. if cause. *Ha. Anal.* 20. 1 *Ju. Eccl. tit. Prohibition*, also *tit. Praemunire* and *Mandamus*. Where it appears clearly, that these ecclesiastical courts are but petit subordinate courts, subject to the controul of the king's superior temporal courts; and that the judges, ministers, and officers thereof, for any neglect of their duty, may be enforced thereunto by the king's courts at Westminster; and in case of their exceeding their stinted power and jurisdiction may be severely punished by the same temporal authority. And that for this clear reason, for that the authority indulged to the church is but by allowance of the temporal power, which hath reserved to its self the superintendancy of this indulged jurisdiction, and necessarily of reforming their Errors, and correcting and punishing their faults, as by many statutes, and adjudged cases reported in the books, and by many records may appear.

2. The temporal courts must always have an eye that the ecclesiastical jurisdiction usurp not upon the temporal. 2 *Inst.* 615. I conceive it is the duty of the temporal judges to preserve the laws of the realm in their full force, et ampliare jurisdictionem, and to suppress and punish all and every usurpations upon its authority, whether it be by depreciating thereof or raising any other to its derogation and diminution. And particularly if any ecclesiastical judges or ministers, or any their officers, or others of their party shall ever be found, either by writing, speaking or acting, thus basely busying themselves, to the hurt of the temporal law, which is the soul of the prerogative and of the rights and liberties of the subject, both spiritual and temporal; they will, according to antient usage and the old common law and constitution of our country, and the office of our temporal magistrates, be deemed and punished, as their demerits by such laws shall demand.

3. The judges of the common law do not look upon themselves, as indeed they are not, bound by the rules of the civil law; but at liberty to follow

follow their own where the two laws differ. 1 *Pe. Will.* 12. *But the ecclesiastical judges are strictly to follow the rules of the common law, where there is such mixture or variance, which sufficiently demonstrates their inferiority and dependance to and on the superior temporal laws and courts, and how much it is the duty of ecclesiastical judges to know the laws of the realm in all such cases.*

4. It is the office of judges to advance all laws made for religion, according to their real end, though the words be short and imperfect. *Hob.* 157. 2 *Inst.* 615, 616. And when any thing is used to the displeasure of God, it hurts as well the soul as the body: and temporal rulers have not only the cure of the bodies but also of the souls of the people, and shall answer for them if they perish by their default. *Doct. & Stud. lib.* 1. *cap.* 32. *Merito summa habetur ratio quae pro religione facit.* *Hob.* 295.

5. Vide 4 *Co.* Digbye's case. 5 *Co.* 14. b. 11 *Co.* 70. b. *Jenk.* 162, 166, 233. 2 *Chan. Ca.* 18. *Salk.* 294. *Carth.* 484. *Bishop of St. David's* case. 1 *Ro.* 452. 1 *Ju. Eccl.* 322, 323, &c.

6. See rule, *Summa est ratio quae pro religione facit.*

149. Fee-simple cannot depend upon a fee-simple.

1. **A** Man cannot have a more large or greater estate of inheritance than fee-simple. *Lit. sect.* 11. And this extends as well to fee-simple conditional and qualified, as to pure and absolute. And he, who hath a fee-simple conditional or qualified, hath as ample and great an estate as he who hath an absolute fee. And from this estate in fee-simple, estates-tail and all other particular estates are derived: and because a man cannot have a more ample or greater estate; therefore two fee-simples absolute cannot be of one and the self same land. If the king make a gift in tail, and the donee is attainted of treason, the king hath not two fee-simples, *viz.* the antient reversion in fee, and another fee determinable upon the dying *sans* issue of tenant in tail, but they are complicated and conjoined together. So it is if such tenant in tail convey to the king, his heirs and successors, the king hath but one fee united in him. And yet in several persons, by act in law, a reversion may be in fee-simple, determinable in another by a matter *ex post facto*; as if a gift in tail be to a villain, and the lord enters, he hath a fee-simple qualified, and the donor a reversion in fee; but if the lord infeoff the donor, now both fee-simples are united, and he hath only one fee in him: but one fee cannot depend upon another, by grant of the party. *Co. Lit.* 18. a.

2. Two fee-simples, which may stand in several persons distinct, when they meet in one person cannot do so, but the great and absolute fee doth swallow up the base and limited fee. *Hob.* 323.

3. A limitation of an inheritance after an absolute fee-simple, is not a good limitation; because that would be to make a perpetuity, which the law will not admit: but if it be upon a contingent fee-simple, it is otherwise. 2 *Chan. Ca.* 19.

4. In an ejectment on a special verdict, the case was, A man having three sons, *John, Edward and William*, and lands in three several vills, *viz.* *A. B.* and *C.* deviseth the lands in *A.* to his son *John*, the lands in *B.* to *Edward* his son, the lands in *C.* to *William* his son; and that if any of them

H h

died,

died, the other surviving should be his heir. *John* the eldest had issue *J.* and dies; the question was, Whether the lands in *A.* shall go to *Edward* and *William* the younger sons, or to the heir of the eldest? *Fleming*, chief justice said, that he conceived it might vest in the two younger sons by way of remainder: and these words, *that every one shall be heir to the other*, tantamounts and implies that every one shall have it after the other; for although the freehold of the eldest son shall be drowned by the descent of the fee; yet it was not so drowned, but that by his death the surviving sons should have it for their lives, by this limitation, and the intent of the will; whereof such construction is to be as made to uphold it if possible it may be. But all the justices, besides *Fleming*, were of opinion, in regard nothing but a freehold passed by the devise, the reversion in fee descending upon the eldest son, had drowned the estate; and that his death afterwards, could not revive and re-vest the remainder in *William* and *Edward*. *Crö. Jac.* 260, 261.

5. See 3 *Chan. Ca.* 19, 29, 31, 32. *Mod.* 115. *Rol. Abr.* 612. 1 *Ro. Rep.* 337. 1 *Lev.* 11, 12. 2 *Lev.* 59. 2 *Saund.* 386.

150. *Felix qui potuit rerum cognoscere causas.*

THEN we are truly said to know any thing, when we know the true cause thereof: *tunc unumquodque scire dicimur, cum primam causam scire putamus: scire autem proprie est rem ratione et per causam cognoscere.* *Co. Lit.* 183. b.

151. *Felony, the punishment annexed to it was, ut poena ad paucos, metus ad omnes, perveniat.*

THE punishment of felony is grievous, 1. To lose his life; 2. In so odious a manner, as to be hanged by the neck between heaven and earth as unworthy of both; 3. To lose his blood, as well to his ancestry; for he is reckoned the son of the earth without any ancestor; as well as to his posterity, for his blood is corrupt, and he hath neither heir nor posterity; 4. His lands; 5. His goods; and in such case the king hath *annum, diem et vassum*, to the intent that his wife and children may be cast out, his houses and buildings laid waste, his trees rooted up by the roots, his meadows ploughed, and all things that he hath for his comfort, delight or sustenance, be wasted and destroyed, because he hath so feloniously offended against the law; and all this was, *ut poena ad paucos, metus ad omnes, perveniat*, &c. 4 *Co.* 124. b.

152. *Feme covert under obedience of her husband, cui ipsa in vitâ suâ contradicere non potuit. Non est sui juris, sed sub potestate viri.*

General.

1. THE law of nature hath put a feme covert under the obedience of her husband, and hath submitted her will to his, which the law followeth, *cui ipsa in vitâ suâ contradicere non potuit*, and therefore will

will not bind her by her act joining with her husband; because they are judged his acts and not hers: so she wants free will. 7 E. 4. The wife *Cestuy que use*, she and her husband sold the land, she received the money, and they both required the feoffee to make the estate to the vendee; and yet she after her husband's death was relieved against the feoffee, and might also against the vendee if he were privy to the use. Note; This was in equity, which judgeth *secundum aequum et bonum*. Hob. 225.

2. The law of England, for necessity's sake, of commerce and the like, by a law of policy, makes bold with this law of nature in an especial kind, and therefore allows a fine levied by the husband and wife, because she is examined of her free will judicially by an authentic person, trusted by the law and the king's writ, and so she is taken in a sort as a sole woman, as also when she comes in by receipt; but this being but a fiction of law must not be extended beyond that, that the law hath granted as a privilege. Nay more, if a feme covert levy a fine as if she were sole, this shall bind her for the reason before given; that she shall not be received to say she was covert, tho' her husband shall; and he may enter and restore the land to himself and his wife both. 17 E. 3. 52. 7 H. 4. 23. 7 Co. 8. The countess of Bedford's case, Hob. 225.

As to her person.

3. The husband has a right to the custody of his wife, and may confine her, but not imprison her, much less put her *dum compos mentis* in a mad-house: and if he should, she may apply to the spiritual court for a divorce *propter saevitiam*: but the feme cannot bring an *homine replegiando* against her husband; for the nature and proceedings in a writ *de homine replegiando* are such, as cannot be maintained by a woman against her husband. Gilb. 149. Prec. Chan. 492.

* 4. An information was moved for against *Newton & al*, for putting a feme covert into a mad-house without cause, and a rule to shew cause was made: it appeared, upon a former motion, this court had granted an *habeas corpus* to take her out of another mad-house, in which she had been confined, and sometime after the above mentioned rule was made absolute; for as the court was pleased to declare, it would be of very dangerous consequence to let such a matter pass without taking notice of it in a pretty severe manner. It was urged against the feme, that she had been taken in an adulterous correspondence, for which the husband might justly confine her in his own or in another's house; and the counsel against her said they could see no reason, why not, in a mad-house. The court admitted the husband might confine his wife, but declared they would by no means allow such things as these. B. R. 2 Geo. 2. *The king and Newton & al*.

Her acts.

5. Regularly she cannot sue without her husband. *Greenwood of courts* 13. Yelv. 210. *Though in equity she may not only sue without him, by her next friend, but may even sue her own husband.*

6. Her answer is none without him, 2 Chan. Ca. 173. *Unless where he is made a party for conformity's sake, or she hath a separate estate.*

7. No decree can be against her without him. 2 Chan. Ca. 173.

8. She

8. She may sue in her trustees names. 2 *Chan. Ca.* 102. *Prec. Chan.* 376. *But such suit may not be without her consent.*

9. Having a separate estate, she may sue without her husband, or may sue him. *Gilb.* 83, 84, 152. *Prec. Chan.* 275, 329.

10. If a feme covert consent in court, though no party to the suit, yet she is bound. 2 *Chan. Ca.* 101.

11. So she is barred by a fine being examined. *Gilb.* 18, 19. *See before General cases* 1, 2.

12. She is not to be examined against her husband. *Co. Lit.* 6. Though in a matter where she was only concerned as executrix. 2 *Chan. Ca.* 39. Yet a wife was examined to discover her husband's deceit. *Tot.* 158. So in *Criminal cases.*

Her separate estate.

13. Money given to the wife for her maintenance, because her husband is an unthrift; the husband pretends the money to be his, but ordered to be at her disposing. *Tot.* 158.

14. A feme covert having a separate estate, on her husband's being arrested, to procure his enlargement, promised payment and was bound; case *Dubois and Dowle* was cited. The court resolved, that a bill having been filed against her and her husband, and a *subpoena* served on her, was good, and process of contempt against her was well; for her husband was only party for conformity sake, and cited *Moore and Hufsey*, *Hob.* 95. where several cases are cited, wherein the wife is chargeable without the husband; and so on her praying time, and entering her appearance with the register, she was discharged, paying cost of the motion. *Note*; Mr. *Howe* moved, that she not being in court ought not to be heard, being an utter stranger, but no notice was taken of that. *Prec. Chan.* 328. *Gilb.* 83, 84. *S. C.*

* 15. The wife having a separate allowance, and living apart, may make a gift of what she saves as a feme sole. See the case before the house of lords, *Gage and Leicester*, 6 Dec. 1715. See 1 *Chan. Ca.* 82, 118. *Pre. Chan.* 44, 121. 2 *Chan. Ca.* 182.

* 16. The case was, that the plaintiff's wife had by cruel treatment been forced to leave her husband, and carry away with her two young children, which, by her labour, and assistance of friends, she maintained, without any help from the plaintiff. They lived 30 years, or thereabouts, separate. One of the said children, being a son, and grown up and settled in the world, became possessed of some personal estate, and particularly of two several bonds of 100*l.* each, one on the *East India Company*, and the other on one *Ledger*; the son being thus possessed made his last will and testament in writing, and thereby devised *Ledger's* bond to his father, the now plaintiff, and gave the said *East-India* bond to his mother, *to her own use, and so as his father should have nothing to do with it*, and made his mother sole executrix and residuary legatee, and died. The executrix proved the will, and delivered said *Ledger's* bond to the plaintiff, who released her as executrix as aforesaid; after the executrix growing old, infirm, and past her labour, offered the said *East-India* bond to the defendant, (with whom and in whose family she had lived as a servant, all or the greatest part of the time she was parted from her said husband) and desired he would take the same to maintain her for her life, which the defendant refused: where-

whereupon she applied herself to several others for the same purpose, but such application proving fruitless, she addressed herself again to the defendant, who after some difficulty, in consideration of her long and faithful service, and long continuance in his family, was prevailed with to come to such agreement with her, but the same was only by parol and not reduced into writing; yet in execution thereof, the defendant told and strictly charged his wife, and only son, in case of his the defendant's death, before them and the said executrix, to keep and maintain her as long as she should live, on the consideration aforesaid, which they both promised to do. And the executrix, in execution of her part of the said agreement, desired the defendant to go with her to the *East-India* house, which he doing, she received all the dividends and interest due on the said *East-India* bond, and then cancelled the same, and directed a new one to be made in the defendant's name, and which was accordingly done. The said executrix dying in a year's time, or thereabouts, the plaintiff brought the present bill against the defendant, and charged his said late wife with having eloped from him, and carrying this bond away with her, and which he charged to be his property. The defendant by his answer insisted, that she did not elope, but was so forced from her said husband, the plaintiff, as aforesaid. That she was an honest, sober and industrious woman. That she had maintained herself and her children as aforesaid. That she lived with the defendant, and in his family, the greatest part of the time she was from the plaintiff; that she always behaved herself in every regard well; and that to the plaintiff's knowledge, who came several times to see her at the defendant's house. The answer further set forth the bond in question, so to have been the plaintiff's son's, and so devised to the mother, and after vested in the defendant as aforesaid, with all the circumstances mentioned. On reading the proofs, the answer was well supported; and particularly it appeared from the evidence of the scrivener, who drew the will, that it was the true intention of the testator, that the said *East-India* bond should be to the separate use of the mother, free from all controul and interposition of the plaintiff. Bill dismissed. The court declaring that the meaning of the testator was plain, that this bond should be for the separate use of his mother, and that he did but his duty therein; and that the agreement having been so executed as aforesaid on both sides, was of such sort as ought to be established in a court of equity. *Relfe and Budder, in Scac', Hil. 11 Geo.*

Their separation.

17. Where agreements have been made for pin-money, or separate maintenance, if the wife refuse to live with her husband, without good reason, this court refuses to assist in the recovery, and in such cases have stopt it. *Barn. 136. See the whole case.*

18. Neither willfulness of the wife, nor pretence of kindness of the husband, nor his desire of cohabitation, shall avail any thing to stay payment of alimony. *1 Chan. Ca. 251.*

19. No alimony without separation, except *pro expensis litis*. *1 Chan. Ca. 251.*

20. The wife was ordered to return to her husband, and further to try his usage, the court declaring, on complaint, they would hear her with favour. *1 Chan. Ca. 251. 1 Vern. 53.*

21. Alimony to cease on their coming together again. *Nels.* 154.
 22. If any real danger, the wife may resort to the decree. *Nels.* 154.
Prec. Chan. 240. 1 *Vern.* 326.

Agreements between them.

* 23. Covenant that the wife shall dispose of her personal estate, does not extend to what shall come to her after marriage. See case before the house of lords, *Pilkington and Cutbberton*, 11 May 1711.

* 24. Wife not bound by agreement, being under age. See case *Lucy and More*, before the house of lords, anno 1730.

* 25. Agreements between them though informal, and out of regular method, to be executed according to the intention of the parties. See case *Halfpenny versus Lady Lawley*, before the house of lords, 10 February 1734.

153. *Fictio cedit veritati.*

1. **F**iction is never admitted where truth may work. As *Cestuy que use* and his feoffee join in a feoffment, it shall be the feoffment of the feoffee. *Hob.* 311.

2. If a man seised of three acres holden in chief, makes a feoffment of all to the use of such person, and of such estate as he shall give or dispose by his will; and he after by his will gives and devises all his lands to *J. S.* and his heirs; this shall carry but two parts of the lands in point of the devise. *Hob.* 160.

3. See last rule, also *Hob.* 225. 12 *Co.* 42. *Mo.* 765. *Yelv.* *Cro.* 1 *Ro. Rep.* 462.

154. *Fictio juris est ubi non est veritas.*

SEE the last rule and reference.

155. *Filiatio non potest probari.*

RULE *Semper praesumitur pro legitimatione puerorum.*

156. *Flumina et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque.*

General.

1. **T**Hough this rule, which is a rule of the civil law, be thus, and so found in *Bracton*, yet by the common law of *England*, a man may have a proper and several interest as well in the water or river as the piscary; and therefore the water may be granted. 11 *R.* 2. *Plow. Cam.* 154. a. If one grant to another *aquam suam*, the piscary in it passeth; because it is included in the word *Aqua*. And in *Nat. Brev.* 123. *A quod permittat lieth de libera piscaria*; also it lieth in grant and tenure; and by a grant

a grant thereof the soil passeth ; it is demandable by a *praeceptum*, &c. *Da. 55. b. 57. b.*

2. One may have a freehold in a piscary. *Fitzb. Ass. 422.* And it is a freehold of itself, and need not be appendant. *Fitzb. Ass. 427. 12 H. 3. Ass. De libero tenemento, scil. of a piscary and recovered ; also a man may make a bailiff of his piscary ; and by Linwood. 101. Proventu fluminum decimae solvi debent ; yet Pisces non offerebantur in templo. Tho. Aquin. 1, 2, q. 102. Da. 56. a.*

The sorts, and to whom belong.

3. There are two kinds of rivers, *viz.* navigable and not navigable. Every navigable river, so far as the sea ebbs and flows, is *flumen regale*, and the fishery a royal one, and belongs to the king by his prerogative ; but in every other river not navigable, and in the fishery there, the tertenants *ex utraque parte aquae* have interest of common right. *Da. 56. a. 57. a. b. 58. a. Vue le case.*

Where and wherefore the king hath interest therein.

4. The reason wherefore the king hath interest in such navigable rivers, so high as the sea ebbs and flows, is because such rivers partake of the nature of the sea, and is a branch thereof before it flows. *22 Ass. pl. 93. 8 E. 2. Fitzb. Coron. 399.* And the sea is only under the dominion of the king ; as is said *6 R. 2. Fitzb. Pro. 46. la mer est del ligeance del roy, come de son corone d'Engleterre.* It is his proper inheritance, and therefore he shall have the lands gained from the sea. *Dy. 15 Eliz. 226. b. 22 Ass. pl. 93.* Also the king shall have grand possessions of the sea, *balaenas et surgiones*, &c. which are *pisces regales* ; and no subject may have these without special grant of the crown. *Praero. Regis, cap. 11. Stan. 37, 38. Braet. lib. 3. cap. 3. 39 E. 3. 35. a.* The king shall have wild swans, as *volatilia regalia*, upon the sea and its arms. See the case of swans, *7 Co.* So wreck is a royal perquisite. See *5 Co. 107. Sir Henry Constable's case.* And upon this reason, before the *Stat. 18 E. 3.* no person might go beyond sea without special licence of the king, but there it is enacted that the sea shall be open for all merchants, and all ports and havens, which are *ostia et januae regni*, belong to the king, he being *custos totius regni* ; and *Fitzb. Nat. Brev. 113. a.* the king is bound to save and defend his realm, as well against the sea as enemies ; and that the king hath as great prerogative and interest in the branches of the sea and navigable rivers, as far as the sea ebbs and flows in them, as he hath in the high sea, is manifest from many authorities and records. *Da. 56. a. b. 57. a. b.*

How may pass and be demanded, &c. in the case of a subject.

5. *Wide ante General. Co. Lit. 5.*

In the case of the king.

6. A royal piscary, or any part thereof, may not pass by the grant of the land adjoining, or by a general grant of all piscaries ; for it is a royal piscary not belonging or appertaining to lands, but is a piscary in gross, and parcel of the inheritance of the crown ; and general words in the king's grants shall not pass such a special royalty as belongs to the crown by prerogative ;

rogative; as Mines Royal, Amerciaments Royal, Escheats Royal, do not pass by the general word of all Mines, Amerciaments and Escheats; and to this intent are many cases directly in point in the case of Mines. *Plow. Com.* 333. *b.* 334. *a.* and 9 & 10 *Eliz.* 268, 269. The grant of the king shall pass nothing by implication. 2 *H.* 7. 13, &c. *Da.* 57. *b.*

7. See *Bract. lib. 2. cap. 12. Co. Lit.*

157. *Fortunam faciunt judicem.*

1. **P**ARTITION among parceners by lot, is, as if there be four parceners, and after partition of the land is made, every part of the land by itself is written on a scrol, and is covered in a ball of wax, so as none may see the scrol, and then the four balls of wax are put into an hat, to be kept in the hands of an indifferent person, and then the eldest daughter shall first put her hand into the hat and draw out her ball or lot, and then the second, and so on to the last, and each to take the lot that she hath drawn; in which case they ought each to stand to her chance and allotment. *Lit. sect.* 246. Of this partition by lot antient authors write, that in that case coparceners *fortunam faciunt judicem.* Of this sort of division you may read in Holy Scripture, where it is said *Dedi vobis possessionem, quam dividetis sorte.* See *Numb. chap. xxvi. ver. 54, 55. and chap. xxxiii. ver. 54. Co. Lit.* 167.

2. Vide *Fleta, lib. 5. cap. 9. Bract. lib. 2. 75. Brit. cap. 72.*

158. *Fraus est celare fraudem.*

General.

1. **A**SSIGNMENT of goods, assigned where the assignor remained in possession, to be deemed fraudulent *quoad* the landlord and creditors, and so *Prec. Chan.* 233. See 3 *Co.* 80.

2. *Dona clandestina sunt semper suspiciosa.* 3 *Co.* 81. *a.* *Prec. Chan.* 286. *Gilb.* 220.

Particular cases.

* 3. The case was, A man brings an action, obtains judgment, and sues out execution against the goods of the defendant, to defeat which, an assignment of the goods is set up to be made to one to whom the defendant was *bona fide* indebted, to pay him and other creditors. Upon the whole it appeared to his lordship, that the assignment was executed *pendente lite* at common law, and that the goods remained in the assignors hands or possession; and therefore his lordship was of opinion that the assignment was fraudulent as to the plaintiff, and should not defeat his execution, or his judgment obtained for his debt. Before lord chancellor King, about *Trin.* 1732. This decree, as I conceive, seems well supported by the whole of the arguments in *Twine's case*, 3 *Co.* 80, &c.

4. There being an old intail deed which the elder brother knew not of, he makes a settlement on his marriage which the younger brother ingrossed, he having privately the intail deed by him; the wife dies, and the husband marries again, being still ignorant of the intail, and the younger brother

also ingrossed the second settlement, still keeping the intail deed secret. The brothers differing, the elder treats of a marriage for his nephew *Raw*, and proposed to settle his estate on that marriage, but died *sans* issue before the marriage took effect, having first by his will given his estate to his wife for life, then to *Raw* and his heirs, who after married pursuant to that treaty, and settles upon the issue of that marriage. The younger brother brings ejectment, and evicts the widow jointress; whereupon she and *Raw et ux* brought there bill, and she was relieved, and had a perpetual injunction, but not *Raw*; because the younger brother was privy to her settlement, and confessed he did not discover the intail, out of fear his brother would have barred him; but it did not appear that he was cognizant of *Raw's* match, who was but a voluntary devisee. *Prec. Chan.* 35, 36. *Raw et ux* *Potte* versus *Potte*.

* 5. Fraud in getting a release from his daughter a few days after she came of age, and but a few days before her marriage, and without the privity of the husband, set aside. See case * *Norton* and *Heron*, 21 April 1732, before the house of lords. So an agreement obtained by fraud and surprize, set aside. See case *Archer* and *Archer*, before the house of lords, 2 March 1718.

* 6. Release of equity of redemption obtained by surprize or misrepresentation, set aside. See case *Kirkway* and *Blake*, before the house of lords, 23 May 1721.

7. *Vide* several rules *antea*, *Where equity to relieve*, and *postea*, *Wherever there is suppressio veri*, &c.

159. *Fraus est odiosa, et non praesumenda.*

Est odiosa.

1. ALL statutes made against fraud shall be construed liberally, and expounded beneficially to suppress fraud. 3 Co. 82.

2. The common law so abhors fraud and covin, that all acts, as well judicial as others, though of themselves just and lawful, yet being mixt with fraud and deceit, are, in judgment of law, tortious and unlawful: *Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur.* 3 Co. 78. a.

3. If a feme, who hath good right to dower, cause *J. S.* to disseise the tertenant, and then recovers dower against *J. S.* she shall not be tenant in dower, though she hath so recovered; because she is privy to an unlawful act which should be the means of her estate. 18 H. 8. 5.

Non praesumenda.

4. Fraud is not to be conceived unless it be expressed. In the principal case, the father purchased copyhold lands to him and his wife, and to *Ralph* their son and his heirs, and two years after became an inn-keeper, and received the profits of the land until 4 August 4 Car. he became debtor by bond to *J. B.* and others, and committed divers acts of bankruptcy, and was adjudged a bankrupt, &c. after the father and mother dying, the son entered, &c. Held by *Bramston*, *Jones* and *Crooke*, against *Berkley*, that he was no bankrupt, as being an inn-keeper; for he does not get his living

by buying and selling, &c. all agreed a copyhold was within the statutes of bankrupts; but the other three judges against *Berkley*, held that being purchased before he was a tradesman, and so long before he became debtor, it is not within the statute, &c. for *fraus est odiosa, et non praesumenda*. Cro. Ca. 549, &c.

5. The earl of *Lincoln* purchased in lady *Gorge's* name, she being his daughter; and after kept courts and made leases in his own name, and always took the profits, and after sold to Sir *Sidney Mountague*; and lady *Gorge* never questioned the matter in the life of her father; yet held, unless some fraud discovered, it is not within the Stat. 27 *Eliz.* although there be many badges of fraud. Cro. Ca. 550, 551.

6. See *Mar.* 34, 35, &c. 3 *Chan. Ca.* 85. 3 *Mod.* 328. *Jo.* 437.

7. See also rules, *Equity to relieve against fraud. Fraus est celare fraudem.*

160. *Frustra expectatur eventus, cujus effectus nullus sequitur.*

EXcommunication under the pope's bull is of no sort of effect or force whatsoever, to disable any person here in these realms. And, as their lordships, the judges, were pleased to declare, whoever should plead such excommunication, or otherwise dare or presume to use the same, must be in a hard case, should the crown duly resent the affront. And their lordships further resolved, that no cause whatsoever arising within these realms, nay, though the same should be spiritual, can be determined at *Rome*, *quia frustra expectatur eventus, cujus effectus nullus sequitur.* 5 Co. De Ju. Regis Eccl. 15. b. 1 Ju. Eccl. tit. The Pope an Usurper, &c.

161. *Frustra fit per plura, quod fieri potest per pauciora.*

1. **T**HE difference taken by *Mowbray* was, when a layman gives lands to a vicar, and when he is endowed by the ordinary of the parson's land, &c. in the first of which cases the ordinary hath not power to dissolve the vicarage, as to the land; but otherwise it is in the other. *Vide* 20 E. 3. *Annuity* 32. 16 E. 3. *Annuity* 24. and *Bre.* 152. *J.* And therefore in regard the ordinary might have dissolved it, &c. (See *Plow. Com.* 497.) That which the ordinary of the diocese might do, the pope might have done, who had supreme jurisdiction over all ordinaries; *ideo frustra fit per plura, quod fieri potest per pauciora*, &c. Cro. Jac. 516, 517.

2. See rule, *In praesentia majoris cessat potentia minoris.*

162. *Furiosus solo furore punitur.*

1. **V**IDE Co. Lit. 247.

2. See also rule, *Actus non facit reum nisi mens sit rea.*

163. *Gene-*

163. *Generalia praeceunt, specialia sequuntur.*

1. **I**N a writ and in the plaint the general shall be put in demand before the special, as land before meadow, pasture, wood, &c. and wood before alders, willows, &c. *Register fo. 2.* Note; *This is the course of the Register.*

2. See *Co. Lit.* and the *Entries*, &c.

164. *General words cannot be applied to particulars.*

DEclared by lord keeper, That general words not particularly applied, ought not to shake a decree, for if they did there would be no end of suits. *1 Chan. 218.*

165. *Grant cannot be made but to him, who is party to the deed, except it be by way of remainder.*

IF a man of meer motion give lands by indenture to *H.* and to his heirs, upon condition that he shall yearly, at a certain day, pay *S.* out of the same lands a certain rent; and if he do not, that then it shall be lawful for the said *S.* to enter, &c. tho' the rent be not paid, yet may not *S.* enter; for he was no party to the deed, so can take no advantage of the condition; and it cannot work by way of remainder of the reversion, though every deed is to be taken most strongly against the grantor, and the taking it so would be an attornment in itself, yet the intent must be according to law, and here that cannot be; for *S.* is no party to the deed; and therefore it cannot be taken by way of grant of the reversion, because of the above rule, that no grant can be made but to him who is party, except by way of remainder. *Doct. & Stud. lib. 2. cap. 20.*

166. *Haeres est eadem persona cum antecessore.*

1. **B**etween *Oates* and *Frith*, the case was, That the father being seised in fee, he and his son and heir apparent by their indenture leased lands to the defendant for years, to begin after the death of the father, rendering rent unto the son. The father died, the lessee entered, and for rent in arrear the son distrained, the lessee brought trespass, and had judgment; for the reservation was held void; for though the son proved heir, it bettered not the case by event, but the reservation must have been to the heir or heirs of the lessor by that name; for that is the only word of privacy in law requisite in reservation of rents and conditions; for the heir is, in representation, in point of taking by inheritance, *eadem persona cum antecessore*; and though in such case the rent could never be demanded by the father, yet the heir shall take it from the father as inherent and rising from the root of the reversion, which was his father's, and which he takes by descent from the father. So the rent itself, which was in the father, though not to be demanded, because not yet due, yet it was so his, that he might have released and discharged it, by the word *rent*, though not by the word *action*;
it

it not being in his time a matter in action. So note a difference, says his lordship, between this case, where rent is reserved upon a lease of the ancestor to the heir first, and where the ancestor grants an annuity or makes a warranty for a like charge against his heirs, first omitting himself, all such grants are utterly void; for no man can charge his heir but as part of himself, and therefore beginning with himself; and such charges stand naked and have nothing that was first in the father, and comes from him to them, whereunto they may cleave as a rent to a reversion in the former case. *Hob. 130, 131.*

2. Vide *Co. Lit. 47, 99, 143, 192, 197, 213, 214.* *11 Co. 10, 12, 18.* *12 Co. 36.* *Plow. Com. 71.* *Dy. 45, 180, 361.* *2 Leon. 214.* *Mod. 362, 575.* *Yelv. 168.* *1 An. 23.*
3. See also, *Nemo est haeres viventis.*

167. Heir favoured.

What.

1. **H**Aeres, in the legal understanding of the common law, implieth that he is *ex justis nuptiis procreatus*; for *haeres legitimus est quem nuptiae demonstrant*, and is he to whom lands, tenements and hereditaments, by the act of God, and right of blood do descend of some estate of inheritance. *Co. Lit. 7. b. 237. b.*

The sorts.

2. There are two sorts of heirs, *Haeres natus, et Haeres factus.* *Gilb. 129.* *Prec. Chan. 3.*

General.

3. The heir who comes in by descent, hath more privilege than any that by other order or means come to lands, &c. See several instances, *Co. Lit. 237. b.*

To whom preferred.

To the wife.

4. Lands were settled upon marriage on trustees, &c. and that if the wife survived she should have the profits of the leases, as the same were then let. The husband made leases and advanced the rent. Decreed the improved rent to the heir. *2 Mod. Ca. 32, 33.*

5. Devise to the wife until the son attain 21, his death at 13 determines her interest in favour of the heir; but if deficiency to pay debts, &c. *aliter.* *Gilb. 36, 76.* *Abr. Eq. 195.* *Co. Lit. 295. b.*

6. The profits of lands are devised to the wife for life, then to be sold for the payment of 100*l.* to the heir at law, and 150*l.* to another; no more shall be sold than to pay these legacies, so that all the land shall not be sold, and the residue of the money go to the wife, neither be distributed according to the statute. *Prec. Chan. 62.*

7. The husband devised the lands in question to his wife for life; the son exhibits a bill, pretending the devise to the wife void; because 25 *Eliz.* the lands were entailed on his great grandfather, to whom he was heir intail; and to discover the deed intail. The wife had the writings in her hands,

hands, and she is ordered to bring in all writings; and it fell out the deed of intail was amongst the rest. The heir by motion *ex parte*, gets the writings out of court, and on motion after was ordered to bring them in again, and they are now in court. At hearing Mr. Keck (after lord commissioner of the great seal) prays the heir may not make the court an instrument to help him to the deed, but that the defendant may be in the same condition she was before the writings were brought in by her, in obedience to the court; for though the devise was voluntary, and not in pursuance of articles on marriage, yet unless the heir would confirm her estate, he ought not to be assisted by the court; for there is a consideration (*to wit*) to provide for his wife; and so it had been if the father in like manner had devised to younger children, for the consideration is good in law (wife) to raise an use at common law; he affirmed there were precedents for him, and the rather because the father had power to dock or bar the intail. Lord chancellor: I will never help against a purchaser, but here it is a bounty in this case; and in such case, the heir having a good title shall be aided; and decreed the deeds to the plaintiff. 2 Chan. Ca. 4. Vide post. *Jointure favoured.*

* 8. One conveyeth all his lands in trust to pay debts and legacies, and then by will deviseth all his personal estate to his wife, yet the personal estate shall come in aid of the real. See case *French and Chichester*, before the house of lords, Feb. 1707.

To administrators.

9. The heir is preferred to the administrator, and shall enforce him to preserve the inheritance from sale, by paying debts out of the personal estate, though the lands were devised to pay debts. 1 Chan. Ca. 281.

To executors.

10. The cause being heard about 1664, and one point being that the heir of the obligor, who had paid a debt of his ancestor upon bond, might be reimbursed his money by the executor of the obligor, who had personal assets, the heir being forced, by suit, to pay the debt. Decreed, the executor should reimburse him as far as there were personal assets come to his hands. 1 Chan. Ca. 74. Vide postea, *In doubtful cases. Money to be reckoned as land.* Vide post. Ca. 23, 24.

To a purchaser.

11. Tenant in tail having agreed to sell, and received part of the consideration money, is decreed to sell; but standing out and dying in contempt, the bill was to revive against the issue in tail, but dismissed; for though tenant in tail had power, and might have barred his issue, yet as he did not execute that power, the issue is not concluded; for the tenant in tail did not do the acts, (*to wit*) levy a fine or suffer a recovery for barring the issue. *Prec. Chan.* 278.

The severals wherein he is favoured.

Not to be disinherited.

12. He is not to be disinherited but by a necessary implication. 1 Vern. 323, 376.

13. Nor without exprefs words. 2 *Vern. Hutton and Simpson's case.*
 14. All devises by implication to disinherit him, must be necessary. *Gilb.*
 115, 138.
 15. The heir disinherited is to be helped if by any construction he may.
Gilb. 31, 41.

In doubtful cases.

16. In doubtful cases the heir is to be preferred before the executor.
 1 *Chan. Ca.* 7. 98. *Margin.* 2 *Chan. Ca.* 49, 115, 152, 156. 2 *Vent.*
 359. 1 *Salk.* 154. 1 *Vern.* 167, 204, 271. 2 *Mod. Ca.* 71.

Money to be reckoned as land for him.

17. Lands devised to be sold to pay debts and legacies is not reckoned
 money for executors or residuary legatees against the heir. 1 *Chan. Ca.* 14,
 98, 280, 281.
 18. Money to be laid out in land, is for him to be reckoned as land.
 1 *Chan. Ca.* 14.

The personal estates to be first liable.

19. Declared by the lord chancellor, that not only the heir, in case he
 be charged with the debts of the ancestor; but a devisee of the lands shall
 be unburthened too of a debt lying on the land, by the personal estate in
 the hands of an executor or administrator, and so shall a devisee of a mort-
 gage, &c. 2 *Chan. Ca.* 84, 85.

20. Personal estate shall pay mortgages in favour of the heir; *aliter* of a
 devisee. 1 *Chan. Ca.* 271. 2 *Chan. Ca.* 197. *Gilb.* 129. *Vide* next
 foregoing case, and *Quaere.*

21. *Haeres factus* of the whole shall have aid of the personal estate; but
 devisee of a particular estate only, shall not. *Prec. Chan.* 3. *Quaere sur*
ceo, this being said by Rawlinson only, Maynard and Kecke saying nothing
to it.

22. As hath been said, the heir is intitled to aid out of the personal
 estate to discharge mortgages; yet having sold the inheritance, he has lost
 that aid; for the equity which he had thereto was in consideration, and
 for the sake of the inheritance descended upon him, that it might be clear
 to the family: so bill dismissed. *Prec. Chan.* 207.

* 23. One by will makes both his real and personal estates liable to
 pay his debts. Decreed the heir should pay the debts by such a time, or
 in default the real estate to be sold; but liberty was given the heir to pro-
 secute for remedy over, out of the personal estate. See case before the
 house of lords, *Sydolphe and Langbourn*, 23 Feb. 1705.

24. The residue of the personal estate is devised to the executors, yet it
 shall be first liable to pay debts, though the lands were devised to be sold
 for that purpose. *Gilb.* 72, 129. *Aliter*, if a specific legacy be to the ex-
 ecutor, or the residuum given to another. *Gilb.* 72, 73, 129.

Defects not to be supplied against him.

25. A defective settlement is not to be supplied against the heir in fa-
 vour of a bastard, though the father and mother after intermarried. *Gilb.*
 139.

26. Voluntary conveyances defective shall not be made good against him. 1 Chan. Ca. 244.

27. One deviseth his copyhold estate to his grandson, and decreed the will good, and that equity ought to supply a surrender, but the house of lords reversed the decree, and held equity ought not to supply such a defect in disfavour of the heir at law, unless in favour of a son or daughter, and not then neither, if to disinherit the eldest son, &c. Salk. 187. Tit. Copyhold, Kettle and Townsend's case.

28. A copyholder by deed conveyed to his bastard daughter, who was admitted, but there was no surrender; the court would not supply the want of a surrender against the heir in favour of the bastard, for she was to be considered here as a meer stranger, being *nullius filia*: and though the father might be bound to provide for her, yet this court was not to make good a voluntary defective conveyance for a stranger, &c. Prec. Chan. 475. And yet where a freeman of London gives bond and judgment for his executors, &c. to pay 500*l.* for bastards and their mother, his testamentary part was liable. Prec. Chan. 17, 18. Vide ante, *To whom preferred. To the wife.* Ca. 6, 7.

Resulting trusts for him.

29. H. had three sons, A. B. and C. and devised his lands to B. his second son, after the death of his wife; to hold to him and his heirs, and then to his own right heirs. H. died and B. entered, and died *sans* issue, living the eldest son. *Et per cur'*: The second son had only an estate tail, and the eldest son shall take by descent and not by the will; and so the devise over is void in point of limitation; for his intent was, that the lands should descend from himself, and not from his son B. If the devise over had been to a stranger, it had been void, and B. had taken a fee, but here it is only an estate-tail. And the word *heirs* can import no more than issue; for B. could not die without heirs, living heirs of the father. Salk. 233. 1 Pe. Will. 23. Nottingham and Jennings's case. See Cro. Jac. 416. Cro. Ca. 58 and 238. and *quaere* the last.

* 30. Devise to A. upon special trust and confidence, that he should pay all the testator's just debts, this is a resulting trust after debts paid for the heir. See case * Kirrick and Blake, 11 March 1727. See also * Errington and Carrick, 15 May 1728, and Tirwith and Trotman, 11 May 1714, all before the house of lords.

Legacies to sink into the real estate for his benefit.

31. See Prec. Chan. 196, 213, 216. 2 Vern. 617. and Gilb. 11. all S. C.

Real estate not to be twice charged.

32. Lands devised to trustees to raise money for several purposes, and they raise it out of the profits, the land is thereby discharged, and they must have resort to the trustees. Prec. Chan. 143.

In suits.

33. He is not bound by a decree against his ancestor in tail, to bar the intail. Gilb. 164, 165. 1 Chan. Ca. 220. Prec. Chan. 278.

34. He

34. He is not to be prejudiced in not bringing a bill in time; for his laches shall not prejudice him as another person's. *Prec. Chan.* 541.

35. See 1 *Chan. Ca.* 176, 178, 98, 74. 2 *Chan. Ca.* 197. 3 *Chan. Ca.* 131. 2 *Mod. Ca.* 170, 171, 185, 186, 187, 188, 189, 190, 197. 1 *Chan. Ca.* 297. 2 *Chan. Ca.* 5, 59, 197. *Prec. Chan.* 439, 452, 381, 54, &c. 1 *Rep. Chan.* 18. 2 *Vern.* 99, 215, 420. 1 *Roll. Abr.* 317, &c. 2 *Vent.* 359. *Salk.* 154.

36. See rules, *Every rightful fee-simple one hath either by purchase or descent. Equity favours younger children. Personal estate to go in ease of the real. In testamentis ratio tacita non debet considerari, &c. Descent tolls entry.*

168. Heir in fee-simple must be he, who hath *sanguinem duplicatum*.

1. **D**escent, *descensus*, cometh of the *Latin descendo*, and legally signifieth when lands do by right of blood fall unto any after the death of his ancestor; or descent is a means whereby one doth derive to himself title to any lands, as heir to some of his ancestors, &c. *Co. Lit.* 13. b.

2. None shall have lands by descent as heir to any man, unless he be his heir of the whole blood. *Lit. sect.* 6.

3. No man can be heir to a fee-simple by the common law, but he who hath *sanguinem duplicatum*, the whole blood, that is, both of the father and of the mother, so as the half blood is no blood inheritable by descent; because he, who is but of the half blood, cannot be a complete heir, for that he hath not the whole and complete blood; and the law in descents in fee-simple doth respect that which is complete and perfect. And this maxim doth not only hold where lands are claimed or demanded by one as heir, but also in case of appeal of death; for if one brother be slain, the other of the half blood shall not have an appeal (albeit he shall recover nothing therein, either in the realty or the personalty) because in the eye of the law, he is not heir to him; also this rule extends to a warranty. *Co. Lit.* 14. a.

4. See *Lit. sect.* 737. 3 *Co.* 4.

5. See rule, *Deficiente uno non potest esse haeres.*

169. Heir not to be charged but as part of his ancestor.

1. **S**EE *Hob.* 130, 131.

2. See Rule, *Haeres est eadem persona cum antecessore. Nemo est haeres viventis.*

170. Heir to inherit any land, must be of the blood of the first purchaser.

IT is an old and true maxim in law, that none shall inherit any land as heir, but only the blood of the first purchaser; for *refert a quo fiat perquisitum*. As for example, *Robert Coke* taketh the daughter of *Knightley* to

to wife, and purchaseth lands to him and to his heirs, and by *Knightley* hath issue *Edward*, none of the blood of the *Knightleys*, though they be of the blood of *Edward*, shall inherit, albeit he had no kindred but them; because they were not of the blood of the first purchaser, viz. of *Robert Coke*. *Co. Lit.* 12. a.

171. *Heir not bound where the ancestor is not.*

1. *FLETA*, *Nota*, *Quod haeres non tenetur in angliâ ad debita antecessoris reddenda, nisi per antecessorem ad hoc fuit obligatus, praeterquam debita regis tantum; a fortiori* in case of a warranty, which is in the realty. *Co. Lit.* 386. a.

2. It is a maxim of the law, that the heir shall never be bound by an express warranty, but where the ancestor was bound by the same warranty; for if the ancestor were not bound, it cannot descend upon the heir. *Co. Lit.* 386. a.

3. But a warranty in law may bind the heir, though it never bound the ancestor. *Co. Lit.* 386. a.

172. *He, who can sell an estate in fee, must have an estate in fee.*

1. *SEE* rule, *Nemo plus juris ad alium transferre potest quam ipse habet.*
2. See also *Salk.* 240. 4 *Co.* 24. b. *Doct. & Stud. lib.* 1. cap. 8.
2 *Mod. Ca.* 40, 42. *Vau.* 181. 2 *Rep. Chan.* 237.

173. *He, who claims by descent in fee-simple, must make himself heir to him, who was last seised.*

FATHER, uncle and son; the son purchaseth land and dieth *sans* issue; the uncle is his heir, and may enter, and if he doth enter and dieth without issue, the father shall have the land as heir to the uncle. *Lit. sect.* 3. But if the uncle doth not enter, then the father may not inherit, because of the maxim, that a man who claimeth as heir in fee-simple to any man by descent, must make himself heir to him who was last seised of the actual freehold and inheritance; and if the uncle in this case do not enter, he has but a freehold in law, and no actual freehold, but the last seised of the actual freehold was the son, to whom the father cannot make himself heir. *Note*; The uncle in this case is heir, but not absolute heir, for if after the descent to him the father hath issue, such issue shall enter upon the uncle: so where one hath issue a son and a daughter, an after born son shall inherit to the first brother, &c. *Co. Lit.* 11. b.

174. *He, who derives an estate from another, must take it upon those terms upon which it is conveyed.*

1. SEE 3 Chan. Ca. 132.
2. See rule, *Cujus est dare, ejus est disponere.*

175. *He, who hath done iniquity, shall not have equity.*

General.

1. **T**HIS rule is to be extended only to the wrong done by him to the party against whom he seeks equity. 1 Chan. Ca. 134, 293. For another rule is, *He, who would have equity, must do equity to the same person from whom he seeks it.* See *Francis's Maxims in Equity*, and *Abr. Eq.* and the other books.

Particular cases.

2. If the lessor will avoid the lease for non-payment of rent at the day, equity will relieve against the forfeiture. But if the lease were gained by fraud, or granted upon a false suggestion, equity will not in such case relieve the lessee; for that were to relieve fraud in chancery. Car. 45.

3. Plaintiff for only 90*l.* lent took a bond for 800*l.* from the defendant when he was drunk, and had judgment upon it; the defendant in right of his wife was intitled to certain lands, which were in others in trust for her; a bill was brought to have those lands subjected to satisfaction. But the court would not relieve, not even for the money the plaintiff had really lent, but dismissed his bill. 1 Chan. Ca. 202. *But had the defendant in this case come into equity to be relieved against the judgment for fraud, he should have been obliged to pay the money really lent.* See rule, *Equity to relieve against fraud; for he, who would have equity, must do it.*

4. The bill was to be relieved for a debt owing by bond from Sir J. S. to whom the lady the defendant was executrix, which debt and bond the plaintiff, in his answer to a former bill, had sworn was fully satisfied to him; but that was to avoid a sequestration of the debt, as was alledged. And the master of the rolls, though that answer was set forth in the defendant's answer in this cause, would not suffer the answer to be read against the plaintiff, but decreed the defendant to satisfy the debt. 1 Chan. Ca. 154. *For though the rule be, That he who hath committed iniquity (as here in the false answer) shall not have equity; yet it seems, that is to be understood when the iniquity is done to the defendant himself, &c.* Max. Eq. 5, 6, 45, &c.

5. See 1 Chan. Ca. 156, 202, 209, 226, 250, 293. 2 Chan. Ca. 15, 17. 1 Vern. 452.

6. See also rules, *Equity will redress or prevent wrongs and mischiefs; will relieve against fraud; and where the matter lieth in compensation.*

176. *He who hath not offended may not be punished.*

1. **V**IDE 4 Co. *Actiones de scandalis ou actiones pur slander.* Lord Cromwell's case, *Yelv.* 47.
2. See also rules, *Usury odious in law.* *Nemo debet bis puniri pro uno delicto.*

177. *He, who takes security by a penalty, ought not to have more, nor indeed so much, if compensation for the damages may be made without it.*

1. **A**NNO 1642, Sir Nicholas Crispe and four more became bound to the defendant's testator in 1600*l.* for the payment of 1000*l.* and interest at six months end. The interest was duly paid till 1644. Michaelmas 1662, the defendant got judgment against Sir Nicholas and one other of the obligors for 1600*l.* (being the penalty,) afterwards there was paid by them, against whom the judgment was, and the other obligors, at several times, to above 1600*l.* and so the bill was to have the judgment vacated, and the bond delivered up, paying so much as would make up the penalty of the judgment, and interest for the same since the judgment. It was insisted *pro quer'*, that when judgment was had on the bond, it remained no longer a debt on bond, nor was interest due on the judgment, so as what was paid after must be taken as paid on the judgment; and if they had brought the 1600*l.* into court at law, (and offered to pay it before execution) the court at law would have accepted it; and therefore, being willing to make up what was paid already the full of the judgment, and damages since the judgment, ought to be relieved against the judgment. *Pro defendente* it was insisted, that there was more money due for interest on the bond, and that that was paid as well by those obligors, against whom there was no judgment, as by those against whom the judgment was; and what was paid by those against whom there was no judgment, their part of what was paid in by course of the court was to be taken as interest; there being more interest due on the bond than the money paid; and there is no equity in this case to hinder the defendant from recovering what he can at law, there being much more in conscience due; and if what is justly due be to be received by any course of law, no equity ought to hinder, so as he do not receive more than principal, interest and costs, which the defendant offers to take on account. It was replied by the plaintiff's counsel, that one satisfaction by any of the obligors shall be a discharge at law to the rest; and a release to one obligor is a discharge to all the rest. And when a man takes a security by a penalty, he sets up his rest there, and makes himself judge of what he would have, and ought not to have more. And after a long debate, where the case of *Whitchcot* and *Underhill* was cited, it was ordered, that the plaintiff do pay so much, with what was paid, as will make up the penalty of the judgment and damages at six *per cent.* for the penalty and costs here and at law, and thereupon the bond to be delivered up, and the judgment vacated; but with this proviso, that if 250*l.* paid in November 1662, were paid before the judgment, and the judgment entered after of that term, that that must be taken as paid for interest, because the defendant received

received it on the bond, the judgment then not being entered, which a master is to examine, and if he find it, to allow the same as paid on the bond for interest, and the master to take the account. 1 *Chan. Ca.* 23, 24. So Note, saith the reporter, That a judgment on bond, on which there is more due than the penalty for principal and interest, is worse security than the bond only; this seems, saith he, very hard and unreasonable, and the equity hereof may well be questioned.

2. *Davis*, employed as a master of a ship by the *East-India* company, covenanted with them, that he would pay a certain mulct for every cloth carried, &c. in the ship, and took the defendant's testator to be his mate, who made the same agreement, *mutatis mutandis*, with *Davis*, and gave a bond of 50*l.* for due performance of his part; but he, without *Davis*'s knowledge, carried so many cloths as the mulct came to 70*l.* which the company deducted out of the master's wages, and the 50*l.* would not satisfy, and therefore he prayed relief, and a discovery of the testator's estate. Defendant demurred. 1. The relief for more than the penalty of the bond, is not proper in equity. 2. That part of the bill which stands for discovery of assets was ill; because the charge in the bill was not positive, that assets, or any goods came to the defendant's hands; ruled in both points accordingly. 1 *Chan. Ca.* 226.

3. Vide 1 *Chan. Ca.* 77, 95, 96, 97. 1 *Vern.* 342. 1 *Rep. Chan.* 95. *Max. Eq.* 3. *Curs. Canc.* 210.

4. See also rule, *Where the matter lieth in compensation.*

178. *He, who will claim a benefit by part of a will, must abide by the whole will.*

* 1. SO pronounced by his honour the master of the rolls, at the rolls, 4 July 1737.
2. Vide *Prec. Chan.* 354.

179. *He who will have equity must do it.*

Exceptions to the rule.

1. OUT of this general rule are to be excepted, 1. Such conditions as are repugnant to the law of God, of reason, or the common law. 2. Such as are repugnant or contrary to the essence of the grant, &c. 3. Such as are only added *in terrorem*, in restraint of marriage, &c. 4. Where the condition becomes impossible by the act of God, &c. 5. Where there is a fraud or practice in him who claims benefit by the breach. 6. In all cases which lie in compensation, the time for the performance may be enlarged, though in the case of a condition precedent. 7. 'Tis also sufficient if the intent of it be performed, though not strictly in the words thereof. 1 *Chan. Ca.* 53. margin.

General.

2. The plaintiff mortgaged to the defendant, who afterwards advanced to the plaintiff more money on bond; the plaintiff brought his bill to redeem, the defendant insisted to be paid his bond debt as well as the money secured by the

the mortgage; and though there was no special agreement for the lands standing security for the bond debt, yet the plaintiff was not allowed to redeem without paying that too. 1 Vern. 244. 3 Salk. 84. And in case the heir is bound in the bond, he must pay that debt, as well as the debt secured by the mortgage. 2 Chan. Rep. 164. 1 Vern. 245. So where there are two mortgages and one is defective, if the heir will redeem he must take both. 1 Vern. 245. 2 Chan. Rep. 23. *But he must be heir to his father, and take as such.*

Particular cases.

3. For where father tenant for life, remainder to his son in tail, mortgaged the lands, and the son after borrows money of the same mortgagee, on security of the same lands; he was not decreed to redeem his father's mortgage, because he was a stranger to his father, as to his estate, whereof he is in by the donor, and *per formam doni*, and not by descent from or as heir to his father. See 2 Chan. Ca. 23.

4. If a mortgage be as a counter-security for entering into a bond of 4000*l.* and after the mortgagor prevails on the mortgagee to enter into a further bond for 2000*l.* though there be no agreement that the mortgage should stand as a counter-security for entering into the last bond, yet the heir shall not redeem without paying that also. 2 Chan. Ca. 23. Neither shall the heir redeem without paying both. 2 Chan. Ca. 97.

5. Baron and feme mortgage the wife's land, the mortgage is forfeited, the husband pays part, and after borrows as much more as he had paid. Decreed that the mortgagee having an estate in him by the forfeiture of the mortgage, he shall hold against the heir till the whole money is paid, principal, interest and costs; and if the heir will not so pay, he shall be foreclosed. 1 Vern. 41.

6. On motion for an injunction to stay proceedings at law on a bond, upon an offer made to give judgment with a release of errors, the lord keeper said, That this was not so beneficial as might be thought; for that notwithstanding the release of errors, the plaintiff might bring a writ of error, and put the defendant to plead his release, and so delay time as long as if no release of errors had been; but the plaintiff's offering to be bound by an order of this court to bring no writ of error, an injunction was awarded. 1 Vern. 120.

7. A lunatic had made a mortgage before his lunacy for 50*l.* which his committee transferred, and took three or four hundred pounds more upon it; but the lord keeper decreed no more than the 50*l.* binding on the estate; for the committee had but an estate during pleasure; and therefore could not make leases, incumber, build, or improve, without special order of the court. 1 Vern. 262, 263.

8. *Hill* having reversed a decree obtained by *Notte*, (See 1 Vern. 167.) dies. A bill was brought, charging that the defendant was tenant in tail, and had covenanted for further assurance, and therefore it was prayed that he might be compelled to perform his covenant in specie, and to levy a fine; but the court denied the plaintiff any relief; and the lord chancellor said, that on hearing of *Notte's* bill, he thought it an hard case, though he did not see sufficient reason to set aside the contract: but as to this bill his lordship said, a contract that carried an equity, to have it decreed in specie, ought

to be without all objection: and said, that the purchasing from heirs was grown too common, and therefore would not countenance it, and dismissed the bill, and left the plaintiff to his action at law on the covenant.

1 *Vern.* 271, 272. 2 *Chan. Ca.* 120. *S. C.*

Note; In this case the lord chancellor said, by the civil law, a bargain of double value shall be avoided, and wished it were so in England. 2 *Chan. Ca.* 121. See 136, *like case*.

9. See 1 *Chan. Ca.* 53, 87, 202, 261. 2 *Chan. Ca.* 136, 212. 1 *Vern.* 29, 141, 294, 467. 2 *Rep. Chan.* 247, 98, 360.

10. See also rules, *Equity to relieve against fraud. He, who hath done iniquity, shall not have equity.*

180. *He, who would redeem, must make a title to the equity of redemption.*

THE plaintiff claimed as heir general to redeem. The defendant by his answer set forth a deed of intail, intitling another to the equity of redemption. The plaintiff prayed he might redeem at his peril, but was not admitted, unless he could make it out that the estate-tail was docked. 1 *Vern.* 182.

181. *Humanum est errare.*

SEE 1 *Ju. Eccl.* 368.

182. *Id certum est quod certum reddi potest.*

General.

1. **I**ncertainty is the mother of contention. *Co. Lit.* 9. *a.*
2. Certainty engenders repose, and uncertainty contention. *Plow. Com.* 25. *a.*
3. Many things uncertain of themselves, being reduced to certainty, by such means as either the law appoints, or the party himself assigneth, may take effect. *Hob.* 174.
4. It ought to be a constant and perpetual certainty, or else it is ill. *Comb.* 44.
5. In some cases there may be certainty in uncertainty. *Co. Lit.* 96.

Particular cases.

6. As one may hold of his lord to shear all the sheep depasturing within the lord's manor, and this is certain enough, albeit the lord hath sometimes a greater and other times a lesser number there; and yet this uncertainty, being referred to the manor, which is certain, the lord may distrain for this uncertainty. *Co. Lit.* 96.

7. It is a maxim in law, that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty. *Co. Lit.* 96. *a.*

8. Upon an avowry, damages cannot be recovered, for that which neither hath certainty, nor can be reduced to any certainty; for *oportet quod certa res deducatur in judicium*. Co. Lit. 96. a.

9. Debt upon a bond, conditioned for the performance of the arbitrament of J.S. so as the same be delivered on 28 February following, at the shop of John Rolfe, scrivener in Cornhill; the defendant pleaded *Nul-tiel arbitrament*. The plaintiff shews the arbitrament 27 February, and what, and that it was delivered at the shop of John Rolfe, scrivener in Cornhill, and shews the breach; whereupon the defendant demurred. One cause assigned by Grimston was, for that the submission is 19 January, and the arbitrament the 27 February, and it is not said to be delivered at the said shop, nor to the above named John Rolfe, and a plea shall be taken strongly against him who pleadeth it. *Sed non allocatur*; for it shall not be intended another person nor another shop, unless the contrary had been shewn. 2dly, Because the arbitrament was uncertain, to pay the charges in such a suit. *Sed non allocatur*; for they are certain enough, when the attorney has made a bill of charges; wherefore it was adjudged for the plaintiff. Cro. Ca. 383.

10. An award was, that one party should pay the other 10*l.* and the costs of a suit now depending in an inferior court, and then to give mutual releases. *Per Cur'*: To pay such costs as the master shall tax, is good; for *id certum est quod certum reddi potest*; but this is uncertain and carries it further than has hitherto been allowed. *Adjournatur*. Salk. 75. *Tamen quaere*, whether the costs in this case are not as certain by reference, as in the case next preceding, or to pay such costs as the master may tax.

11. Gilb. 48, 61. Pal. 32, &c. 264, 277, 318. Yelv. 112. 4 Co. 15. a. b. 1 Co. 176, 177. Hob. 313. Co. Lit. 6. a. 231. a. Cro. Eliz. 10. 5 Co. 6. a. Plow. Com. 523. b. 2 Vent. 242. 4 Co. 34. 6 Co. 6. a. 8 Co. 56.

183. *Id possumus quod de jure possumus.*

Id possumus quod de jure possumus, therefore where 9 E. 6. an office was given to one, if he were able to exercise it, these words were deemed idle; for the law saith, that he shall not have it, if he be not able to exercise it. Lane 116.

184. *If the substance of a condition is performed, it is sufficient.*

VIDE rules, Equity to relieve where the matter lieth in compensation. Condition precedent must be literally performed, &c. Equity will not vest an estate, where by reason of a condition precedent it will not vest at law. He who will have equity must do it.

185. *Ignor-*

185. *Ignorance of one's right not to prejudice his right.*

1. **T**HE mother, after the death of her husband, had released her dower to her son, under a false pretence that her late husband had left her 3500*l.* in lieu of dower. On the plaintiff's marrying with the son this release was produced, and shewn to the plaintiff and her relations, and in confidence thereof the marriage took effect, and a settlement was made and the portion paid. On the question, Whether the mother, who had recovered dower at law, should be concluded by this release, and obliged to part with her dower, to make good the plaintiff the daughter's settlement? the court decreed for the plaintiff; tho' it was insisted the release was gained by practice of the son, after the death of the father, and such false pretence, whereas the 3500*l.* devised to the mother was not meant or intended to be in lieu of dower, and the son, who had surprized her in the release, had also defrauded her of the 3500*l.* 2 *Vern.* 131, &c.

2. Vide 1 *Vern.* 19, 32, 206. 2 *Chan. Ca.* 108.

3. See rules, *Wherever there is suppressio veri, &c. Equity to relieve against fraud. In odium spoliatoris omnia, &c.*

186. *Ignorantia facti excusat.**General.*

1. **I**gnorance of the deed, which may be called the ignorance of the truth of the deed, may excuse in many cases. *Doct. & Stud. lib. 2. cap. 46.*

Particular cases.

2. If a man buy an horse in a market overt of one, who had no property to him, not knowing but that he had right, he hath good right and title to the horse; and the ignorance shall excuse him; also if a man retains another's servant, not knowing he is retained with him, ignorance excuseth him; the law is the same of him who retaineth another's ward. If homage be due, and the tenant after the homage due maketh a feoffment, and the lord ignorant of the feoffment distrain for the homage, ignorance excuseth him. Also if a man be bound in an obligation to repair the houses of the obligee by such a time, as often as need shall require, and after there is need of repairs, but the obligor knows it not, there his ignorance shall not excuse him; for he having bound himself must take knowledge at his peril; but had the condition been, that he should repair such houses as the obligee should assign, and after he doth assign certain houses to be repaired, but the obligor knows not of it, ignorance shall excuse him; for he bound himself to no repairs certain, but such as the party shall assign, and if he assign none, the other is bound to none, and therefore since he, who should make the assignment, is privy to the deed, he is bound to give notice of his own assignment; yet had the assignment been to a stranger, he must have taken knowledge at his peril, &c. *Doct. & Stud. lib. 2. cap. 47.*

3. But if a man buy lands whereto another hath title, but the buyer knoweth it not, yet that ignorance doth not excuse him, no more than of goods.

goods. Also if a servant come with his master's horse to a town, that, by custom, may attach goods for debt, and upon a plaint against the servant, an officer of the town, by information of the party, attacheth the master's horse, thinking it was the servant's; ignorance excuseth not; for when a man will do an act, as to enter into land, seise goods, take distress, or such other, he must by the law at his peril see that what he doth be lawful. So if a sheriff by replevin deliver other beasts than were distrained, though the party that distrained shew him that they were the same, yet an action of trespass lieth against him, and ignorance shall not excuse, for he shall be compelled by law, as all officers commonly are, to execute the king's writ at his peril, according to the tenor of it, and to see that the act he doth be lawfully done, &c. *Doct. & Stud. lib. 2. cap. 47. Dy. 25, 29.*

4. See rules, *Caveat emptor. Executio juris non habet injuriam.*

187. Ignorantia juris non excusat.

General.

1. *Ignorantia juris non excusat.* Skin. 491. Ignorance of the law excuseth no man, not that all men know the law; but because it is an excuse every man would plead, and none can tell how to confute him; therefore of necessity, for the general good, all men are presumed conscious of the law; though of the fact he may be sometimes ignorant, and that ignorance be his sufficient excuse.

2. Ignorance of the law, though it be invincible, doth not excuse but in few cases; for every man is bound at his peril to take knowledge what the law of the realm is, as well statute as common. *Doct. & Stud. lib. 2. cap. 47.*

Particular cases.

3. If a penal statute be made, and it is enacted that the statute shall be proclaimed by such a day in every shire, which is not done before the day, after the day a man offends against the statute, he shall run in the penalty if there be no further words in the statute to help him; and the reason is, because there is no statute made in this realm but by the assent of the lords and commons, who represent the state of the whole nation; and every statute there made is of as strong effect in law, as if all the commons were there present in proper person at the making thereof; so the law presumeth there needeth no proclamation, when it is made by their authority; and though it be enacted, that it should be proclaimed, that is but of favour and not of necessity; and therefore not to be taken that the intent of the legislature was that it should be void if not proclaimed; and that any should be discharged by the law by ignorance, there are but few cases, as it might in some cases be applied to infants, &c. *Doct. & Stud. lib. 2. cap. 46.*

4. Resolved, Forasmuch as in the case at bar, a *ca' sa'* was awarded against the countess of Rutland by the court of common pleas, that the sheriff, or his officer by his warrant, might, without any offence, execute it; for they are not to dispute the authority of the court, but to execute the writs to them directed, whereto they are sworn; and though it appear in the *capias* that she was a countess, against whom, by law, no *capias* lieth, *et ignorantia juris non excusat*, especially sheriffs and other ministers of law and justice, as was objected; yet forasmuch as in some cases of contempt, &c.

a *capias* lies against them; therefore it was resolved, that the sheriff and his ministers could not examine the judicial acts of the court, but were to execute the writs; wherewith agrees the opinion 36 H. 8. Dy. 60. If a *capias* or *exigent* come to a sheriff against a duke, earl, &c. where it doth not lie against them, the officer ought to serve the writ, and not to dispute the validity of it. 6 Co. 54. a.

5. Vide 1 Co. 175. Mildmay's case. Hob. 223. Comb. 269.

6. See rules, *Executio juris non habet injuriam*. *Ignorantia facti excusat*. *Caveat emptor*. Ignorance of one's right not to prejudice his right.

188. *Impersonalitas non concludit nec ligat.*

VIDE rule, *Simplicitas est legibus amica*, &c.

189. *Impotentia excusat legem.*

1. **R**ESolved on a special verdict, That a parson ought to reside on his rectory, upon the parsonage house, and not in another, though within the same parish; for the statute doth not only intend for serving the cure and hospitality, but also for the maintenance of the house for habitation of the parson, and that not only for himself but for his successors, that they also might maintain hospitality there; yet lawful imprisonment without covin, or want of a parsonage house, are good excuses for non-residence; for *impotentia excusat legem*, and these cases are excepted out of the act by construction of law: sickness also *sans* fraud, as was held in *Scac' Trin.* 39 Eliz. is also a good excuse, if the patient removed by advice of his physician *bona fide*, for better air and the recovery of his health. See 6 Co. 21.

2. See Mo. 540, 448. Gilb. 230. 2 Ju. Eccl. 401, 402.

3. See also rules, *No construction can be too liberal to make parsons reside and take care of their parishes*. *Quando duo jura concurrant*, &c.

190. *In aequali jure melior est conditio possidentis.*

DRURY brought error upon a judgment given in B. R. in a *Quare impedit* brought by the queen, where the case was, A countess being a widow, retained two chaplains, and then a third, who purchased a dispensation to have two benefices with cure, and was advanced to two, whereof the first was above 8*l.* a year; and if he was lawfully qualified within the statute 21 H. 8. cap. 13. was the question in C. B. for if it was a lawful qualification, then the first benefice was not void by acceptance of the second, and by consequence no such title to present by lapse devolved to the queen: and it did not appear by the pleadings, that the first two chaplains were alive at the time the third was advanced, but only that the two first were alive at the time the third was retained: whereupon the great question arose in B. R. It had been adjudged in C. B. that a title to present by lapse was devolved to the queen, and judgment given accordingly. And after many arguments at the bar and bench on error in B. R. the former judgment was affirmed, in which two points were resolved; 1st, When the countess re-

tained two chaplains, they are capable of dispensation according to the act 21 H. 8. whereby it is provided, That every countess, being a widow, may have two chaplains, whereof every one may purchase licence or dispensation; and when she hath retained two the statute is executed; for she cannot have more capable of dispensation, and the retainer of the third may not devalue the capacity of dispensation which was vested by their retainer in the first two. And though the countess might, at common law, have as many chaplains as she pleased, yet she may not have more than two capable of dispensation by the statute; and reason requireth that he who hath served longest should be first preferred; *qui prior est tempore potior est jure*. Vide Dy. 312. By the opinion of Catlin, Saunders, and Dyer, if a lord, who is allowed but three chaplains, retains six at one and the same time, and all are preferred, those first promoted are warranted by the statute, and yet the retainer was not according to the statute; but *in aequali jure melior est conditio possidentis*. 2dly, Resolved, that when the first two were retained according to the statute, and so the statute executed, the retainer of the third, though good at law, yet was void to give him capacity to purchase dispensation within the statute; and therefore, though the other two were dead before the third's advancement, yet as they were alive at his retainer, *which retainer was at the common law, and not by the statute*; therefore he ought to have had a new retainer after the deaths of the other two, and before his advancement; for *quod ab initio non valet, in tractu temporis non convalescet*. As if the son and heir apparent of a baron retain a chaplain, and his father dies, and the chaplain purchaseth dispensation, this retainer, though by letters under hand and seal, will not serve him; because they were not good at first; and if a baron retains two chaplains according to the statute, and they purchase dispensations, and are advanced according to the statute, now if the lord discharge either of them from his service, he may not retain another during his life; for by such means he might advance chaplains *sans* number, and so the statute be defrauded; for the statute limits three only to have the benefit of the statute, as was adjudged in *C. B. Pasch. 28 Eliz. Rot. 1130.* in a *quare impedit*, between the queen and the bishop of Gloucester, and Edward Savacre, and affirmed on error in *B. R.* and it was said *this statute should be taken strongly against pluralities*; and therefore it was held, that if a baron, who by the statute might retain three chaplains, be made warden of the *Cinque ports*, who might have a chaplain in respect of his office, yet he should have but three. So if a baron having three, be made an earl, he shall have but five in all, *et sic de caeteris*. 4 Co. 89. Drury's case. See also Aiton's case, 5 Co. 89. Mo. 277, 561, 562, 678. Cro. Eliz. 839. Dy. 312. Plow. 88. An. 200. Hob. 103, 199.

191. *Incerta pro nullis habentur.*

1. **A** Grant of all his trees and woods upon *Black-acre*, as reasonably may be spared, is a void grant unless referred to a third person what might be spared. Dy. 91.
2. Upon two several writs for the same matter against the same person, returnable at the same time, both shall abate. Mansel's case.

3. The

3. The lord chancellor said, he took it for a rule, that wheresoever there is a demand in law or equity, there must be a certainty of the thing demanded to be adjudged or decreed. 1 Chan. Ca. 309. See *Daw.* 33.

4. See also rules, *Salus populi est suprema lex. Id certum est, quod certum reddi potest. Law favours justice and truth, &c.*

192. *In chancery every particular case stands on its own bottom, or on its own particular circumstances, which is not so at law.*

1. **T**HE common law relieves not particular cases against the general rule, but in chancery every particular case stands on its own particular circumstances; and though in general the law will not relieve, yet equity doth, so as the example introduce not a general mischief. 2 Chan. Ca. 93. Vide *The introduction to these sheets, equity what, of what it holdeth cognizance, and where no relief either at law or in equity.*

2. Equity in every case is governable by the circumstances. 3 Chan. Ca. 45.

3. There is no doubt but there may be good ground, in some cases in equity, to set aside that which is good at law. 3 Chan. Ca. 73.

193. *Incidents may not be severed.*

1. **O**NE grants to another estovers to be burnt in such an house, they shall go with the house, by whatever title holden; for the one is inseparably incident to the other. *Fi. Ley* 5. a.

2. Lord and tenant by fealty and homage, the lord releases his fealty, this is void; for fealty is incident to homage. 7 E. 4. 11.

3. An office of skill and diligence, or an annuity *pro consilio impendendo*, may not be forfeited by attainder for treason. *Fi. Ley* 5. a. b.

4. Lease of a manor, except the services; the exception is void, for it is parcel of the thing demised. *Dy.* 97.

5. See 31 E. 3. *Aff.* 44. *Bro. Abr. Incident* 34. *Co. Lit.* 93, 251. *Plow. Com.* 500. *Hob.* 181, 215, 216. *Skin.* 491.

194. *In civile est, nisi tota sententiâ perspectâ, de aliqua parte judicare.*

1. **I**N the same sentence it is vain to imagine one part before another; for though words can be neither spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence. *Hob.* 171. But in grants of particulars sufficiently once ascertained, another mistaking will not frustrate, though it be false. *Hob.* 171. But a thing certain may be diminished tho' not wholly made void, as was *Oguel's* case, 4 Co. *Hob.* 171. See *Cro. Eliz.* 255. 2 Co. 23. b. 51. a. 55. a.

2. *Liberum maritagium* are such words of art, and so necessarily required, as they cannot be expressed by words equivalent, or amounting to

as much; as if a man gives lands to a man with his daughter *in connubio soluto ab omni servitio*, &c. yet there passeth in this case but an estate for life, for seeing that these words *in liberum maritagium* create an estate of inheritance against the general rule of law, the law requireth that they should be legally pursued. *Co. Lit. 21. b.*

3. If divers parcels of lands be contained in a deed, and seisin is delivered of one parcel according to the deed, all the parcels pass; though he saith not (in name of all, &c.) because the deed contains all. So if there be divers feoffees, and livery of seisin be only to one. If a man make a charter in fee, and deliver seisin for life *secundum formam chartae*, the whole fee passeth; for it shall be taken most strongly against the feoffor, &c. *Co. Lit. 48. a.*

4. See 2 *Co. 55. b.* *Cro. Eliz. 255.* *Cro. Ca. 155.* *Cro. Eliz. 131.* *Cro. Jac. 175.* 3 *Lev. 339.* 2 *Vent. 142.* 1 *Mod. 27.* 6 *Mod. 66.* *Salk. 346.* *Skin. 531, 543, 544, 545.* *Dal. 5, 30, 57, 79.* 2 *Ro. Abr. 65.* *Co. Lit. 6. a. 299. a.*

5. *Vide* rules, *Constructions to be secundum aequalitatem rationis. To be with equity and moderation, &c. Quae non valent singula, juncta juvant.*

195. *In consimili casu consimile debet esse remedium.*

VIDE rule, *Ubi eadem ratio, ibi idem jus*, and *Hard. 65.*

196. *In fictione juris semper aequitas existit.*

1. IF one disseise me, and cut the trees, grafs, or other emblements growing upon the lands, and after I re-enter, I shall have an action of trespass against him *vi et armis*, for the trees, grafs and emblements, &c. for after my re-entry, the law, as to the disseisor and his servants, supposeth the freehold all along to have continued in me; but if my disseisor maketh a feoffment in fee, gift in tail, lease for life or years, &c. and after I re-enter, I shall not have trespass *vi et armis* against them, who come in by title, for the fiction of law, that the freehold continued in me always, hath not relation to make one, who came in by title, to be a wrong doer *vi et armis*; for *in fictione juris semper aequitas existit*, but in such case I shall recover all the mesne profits against my disseisor in the same manner, as a disseisee should have recovered in an assise at common law, before the statute of *Gloucester, cap. 1.* damages only against the disseisor. Also it is to be presumed that the feoffee gave a consideration to the disseisor, and that is the reason he shall be charged with all, &c. 11 *Co. 51. a. b.*

2. Disseisor is disseised, and the first disseisee re-enters, he shall not have an action of trespass against the second disseisor; because that the fiction of law, as to the actions, extendeth only to the first disseisor; and if I might punish here the second disseisor, he would be twice charged, &c. 11 *Co. 51. b.*

3. See rules, *Equality is equity. Nemo debet bis puniri, &c.*

197. *Infinitum in jure reprobatum.*

VIDE rule, *Law favours justice and truth, &c.* Hob. 159.

198. *Inheritances may lineally descend, but not ascend.*

1. **T**HERE is father, uncle and son, the son purchaseth lands in fee-simple, and dies *jans* issue, living his father; the uncle, and not the father, shall have the lands as heir to the son, yet the father is nearer of blood; because it is a maxim in the law, that inheritances may lineally descend but not ascend, &c. *Lit. sect. 3.*

2. Only lineal ascent in the right line is prohibited, and not in the collateral. *Quaelibet haereditas naturaliter quidem ad haeredes haereditabiliter descendet, nunquam quidem naturaliter ascendit. Descendit itaque jus quasi penderosum quod cadens deorsum recta linea vel transversali, et nunquam reascendit ea via qua descendit post mortem antecessorum, a latere tamen ascendit alicui propter defectum haeredum inferius provenientium;* so as the lineal ascent is prohibited by law, and not the collateral; and in the prohibiting the lineal ascent, the common law is assisted with the law of the twelve tables. *Co. Lit. 11. a.*

199. *Iniquity bars equity.*

1. **T**HE defendant by a trick got the deed into his hands, and burnt or cancelled it. The court said, where deeds are suppressed, *omnia praesumuntur*, and would not direct a trial at law, which had not been denied, had not the defendant been guilty of fraud. *1 Chan. Ca. 293.*

2. The plaintiff having made false pretences of love to the defendant, and debauched her, and got her with child, gave a bond of 500*l.* conditioned for payment of 50*l.* no place was appointed where to be paid; wherefore he brought his bill, and offered to bring the 50*l.* into court, but the court would not grant an injunction. *2 Chan. Ca. 15.*

3. The plaintiff and defendant having married two daughters of *J. S.* on his decease there were some loose papers concerning some accounts between the plaintiff and the father, put together in a bundle and sealed up by two persons then present, and delivered to the defendant to be safely kept, he being told they were matters of concern; and there being now an account decreed of the estate of *J. S.* which was to be equally distributed between the plaintiff and defendant, the defendant demanded, as due from the plaintiff to his father's estate, for diet, &c. 2300*l.* but it appeared on proof, that the defendant had altered the bundle, and displaced the papers, and that it could not be known what papers had been taken out; and the master having reported that the defendant had suppressed the evidences; the court therefore disallowed the defendant's whole demand against the plaintiff, though he swore he had produced all, and though they appeared to be half-yearly accounts relating to one another, and not one missing; but the account carried down to within a little time of the testator's death; and though the lord chancellor declared himself satisfied, that all the papers

papers were produced, yet for the reasons aforesaid he wholly disallowed the demand. 1 Vern. 452.

4. The bill was to call the defendant, the plaintiff's steward, to an account; the defendant, by way of plea, insisted the plaintiff ought not to be relieved in this court. 1st, For that she had brought a bill here before, and also sued at law for the same matter, and on election chose to have the bill dismissed, and not having success at law would now resort back to equity. 2dly, For that she had in a violent manner seized the defendant's writings and evidences, and even imprisoned his person: and *detinue* of charters is a good plea in account at law, and ought to be so here; and that though the plaintiff might alledge the trunk restored, yet that ought not to excuse; for such violent seizure is evidence of the plaintiff's design to take from the defendant some material papers, and when she had got them it is to be presumed she took them, and it is not to be expected that the defendant should prove what papers the plaintiff took. *Cur'*: As to the first objection, dismissal on election is not peremptory, no more than a nonsuit at law; and as to the second, though such proceedings are not to be approved or countenanced, yet they cannot amount to a forfeiture of the right, which the plaintiff hath to call her steward to an account; and tho' *detinue* be a good plea at law in bar of account, yet it is not good to say the plaintiff did once seize his papers or writings, but it is the *detinue* of them which makes the plea good; and as to the imprisonment, the defendant hath his remedy by action; but a man may surely justify detaining his servant who was taking away his goods; the court therefore ordered, that whereas there was a considerable sum of money in the trunk, that the money as well as the writings should be restored; for though the defendant might be greatly in the plaintiff's debt, yet she was not to levy her own debt after that manner, and ordered the defendant to answer. 2 Vern. 32, 33.

5. See 1 Chan. Ca. 96, 154, 209, 250. 2 Chan. Ca. 15, 102. 1 Vern. 53. S. C. Max. Eq. 6. Margin. 2 Vern. 426.

6. See also rules, *He, who hath done iniquity, shall not have equity. He, who will have equity, must do it. In odium spoliatoris, &c. Wherever there is suppressio veri, &c.*

200. *Injuria non praesumitur.*

1. **I**T shall rather be intended he cometh to the deed by lawful, than wrongful means, *Lit. sect. 377.* except some proof, &c. *contra.*

2. *Omnia praesumuntur legitima facta, donec probetur in contrarium. Injuria non praesumitur.* Co. Lit. 232. b.

3. *Quaere de dubiis, quia per rationes pervenitur ad legitimam rationem.* *Lit. sect. 377.*

4. See rule, *Fraus non est praesumenda.*

201. *In majore summa continetur minor.*

1. **V**IDE 5 Co. 114. *Wade's case.*

2. See also the rule, *Omne majus continet in se minus.*

202. *In maxima potentia minima licentia.*

1. **T**Herefore tenant after possibility of issue extinct, and tenant for life, though by express grant dispunishable of waste, &c. shall be restrained from pulling down of houses or defacing a seat. 2 *Chan. Ca.* 32. *Gilb.* 127. *Salk. S. C.* So of a jointress. *Nelf.* 190. So of tenant for life. *Nelf.* 220, 221.

2. A bill was preferred in favour of an infant *in ventre sa mere*, to restrain waste, and decreed, and an injunction granted. *Prec. Chan.* 50. *Barn.* 274. And waste and destruction being of this sort committed, was decreed to be repaired by the party, though dispunishable of waste. *Prec. Chan.* 454. And such must not suffer premisses to run out of repair. *Nelf.* 190. *Mildmay's case.* 1 *Co.* 175. *Hob.* 159. For there is nothing more contrary to liberty than licentiousness, nor to discretion than foolishness. *In maxima potentia minima licentia.* *Hob.* 159. *Est quiddam perfectius in rebus licitis.* And St. Paul himself saith, *all things are lawful, but all things are not expedient.* See his first Epistle to the Corinthians.

3. See rule, *Est quiddam perfectius in rebus licitis.*

203. *In odium spoliatoris omnia praesumuntur.*

General.

1. **W**Herever there is a *suppressio veri*, or *suggestio falsi*, the release, &c. shall be void. 1 *Vern.* 19, 20.

Particular cases.

2. Three daughters being equally intitled as co-heirs, the husband of one fearing to be in law, and being made to believe he should pay costs, released his share to the other sisters, who were to bear the charge of the suit; his share amounted to above 1000*l.* this release was set aside, and *Luxford's case* cited, that misapprehension of the party shall avoid his release. 1 *Vern.* 32.

3. The bill was to be relieved against a purchase made by defendants from the plaintiff's father, suggesting he had been circumvented and imposed upon; the defendants insisted upon their purchase, and shew that first there were articles, and then conveyances pursuant thereto, and a fine; and that the father seeing the plaintiff uneasy thereat, took a release from him of all his right. Notwithstanding all this, the lord keeper set the purchase aside; it appearing art was used with him, &c. 1 *Vern.* 205.

4. The defendant took out execution in breach of an injunction of this court, and the bailiffs who served it, having found a place in a wall made up again with bricks, wherein was hid 150*l.* took it away, and did great spoil in the plaintiff's goods; the order by the late chancellor was, that the defendant should make satisfaction; and now this matter coming before the lord keeper, it was said the plaintiff ought to seek his remedy against the officers, but the order was confirmed; for it would be an idle thing to put a thief to his oath to accuse himself; for he, who has stolen, will not stick to forswear it; and therefore *in odium spoliatoris*, the oath of the party

party shall be a good charge upon him, who hath done the wrong. 1 Vern. 207.

5. See 1 Chan. Ca. 96, 154, 293. Hob. 99. 1 Vern. 49, &c. 53, 19, 20, 32, 452, 467, 294. 2 Vern. 561, 308, 32, 129, 293. 2 Pe. Will. 680. 1 Vern. 53. S. C. Fra. Max. Eq. 6, 129. Prec. Chan. 7.

6. See also rules, *Iniquity bars equity*. *Wherever there is suppressio veri, &c. He, who will have equity, must do it. He, who hath committed iniquity, shall not have equity.*

204. *In odium spoliatoris, the oath of the party wronged shall be a good charge upon him who hath done the wrong.*

SEE last rule, case 4.

205. *In praesentia majoris cessat potentia minoris.*

1. **T**HE pope formerly, being considered as supreme ordinary over all other ordinaries, used to visit, correct, dispence, and tolerate within every diocese of this realm sole, and he used to make appropriations *sans* the bishop. And these matters were then taken for good, or at least suffered. And the bishop, who was taken but for an inferior ordinary, never contradicted it: but it was used and accepted as good; for *in praesentia majoris cessat potentia minoris*, and so appropriations made by the pope sole *sans* the ordinary, were taken as good. The case in *quare impedit* 29 E. 3. was cited, brought by the earl of Sarum against the prior of Montague, where the appropriation was pleaded, made by the apostle, with the assent of the king, without mentioning the ordinary, and was allowed good; and many cases of like sort were cited, and the pope used to make provisions before the statute 25 E. 3. restrained him; where the provisor was in without any admission, institution or induction, for or by means of the bishop, and so the pope's authority, being taken as absolute, bound the bishop as his inferior; and such authority and jurisdiction as the pope used in this realm, was acknowledged by the parliament anno 25 H. 8. and other statutes, to be in the king, so that he had that jurisdiction, and lawfully might use all such as the pope was accustomed to use within this realm; and from that king the same authority descended to his son and other successors to the crown. And he, E. 6. being supreme ordinary, might and did appropriate, &c. of his own authority and jurisdiction *sans* the bishop; and to such effect in the principal case, he put these words in his charter, *authoritate nostra regia suprema, &c.* Plow. Com. 498, &c. But it could not be *sans* consent of the patron, 498. a. b. 500. a.

2. All the judges declared the law to be, that a resignation by the dean of Wells to the king, was good and effectual, as to the head of the church, as if it had been to the bishop, and the deanary was void by it. Plow. Com. 498. a. For *in praesentia majoris cessat potentia minoris*.

3. But an appropriation cannot be made without the consent of the patron, because the patron hath a temporal inheritance in the advowson, that

is to say, a fee-simple, which the ordinary, nor in antient time the pope, could not take from him, nor alter without his consent; but in appropriations the patron is a party, and the ordinary is the agent, and does all what he does, in this matter, in execution of what the patron hath ordained, and is all intended to be done at his request, as the benefit is his. The king is supreme patron as king, and not in respect of the supreme jurisdiction which the realm, by the statute, hath acknowledged in him, and which the pope exercised before, 499. *a. b.* 500. *a.* And the king by this prerogative may provide to a church and dispencc without jurisdiction, &c. 500. *a.* 503. *a.* and appropriate as supreme ordinary, by his ecclesiastical jurisdiction, 501. *a.* If the king found a church, hospital or free chapel donative, he may exempt the same from ordinary jurisdiction, and his chancellor shall visit the same, nay, if he found the same, without any special exemption, the ordinary is not, but the king's chancellor is to visit them; and as the king may create donatives so exempt, so he may by his charter licence any subject to found such church or chapel, and to ordain that it shall be donative, and not presentable, and to be visited by the founder, and not by the ordinary. *Co. Lit.* 344. *a.* Nay if the meanest subject erect and endow a chapel, hospital, &c. he is the natural visitor and not the ordinary; for the party comes not in by means of the ordinary, but by the appointment of the founder, &c. See *Gilb.* 181, 178 to 183. *Show. Parl. Ca.* 51. 4 *Mod.* 112. *Co. Lit.* 96. *Skin.* 484, 494. *Fitzb. Nat. Brev.* 42. (A.) (B.) *Pal.* 451. 13 *Co.* 11. *Elf. Obj.* 26. 1 *Pe. Will.* 326. 3 *Lev* 212. *Skin.* 502. *Fitz. Abr. Excom.* 9. 1 *Mod.* 12, 260. 2 *Mod.* 257. *S. C. Mo.* 755. *Ha. Anal.* 19. 1 *Ju. Eccl.* 5. *b.* 26. 2 *Ju. Eccl.* 182, 481, &c. 486 to 493.

206. *Intention being clear, all means, without which that cannot be attained, must be supplied by a court of justice.*

1. **A** Man is seised of divers manors, lands or tenements in fee, of socage tenure, and by his will in writing deviseth all his said manors, lands and tenements to his sister and her heirs for ever, (except out of this general grant my manor of R. which I do appoint to pay my debts) and made two executors by name, and died, and one of them died, and the other took upon him the charge of the executorship, and sold the manor to R. in fee for 300*l.* for the purpose aforesaid; and, by the opinion of the court, he well might, and that by reason and circumstances this was the intention of the testator, and not to leave the reversion to the heir, but to trust his executor with the sale for the speedy payment of his debts. *Dyer* 371. *b.*

2. See 1 *Chan. Ca.* 177. 2 *Leon.* 220.

207. *Intention being secret and not declared, it must give way to the legal intent.*

1. **T**HE testator made two executors, and deviseth to them *residuum bonor'*, &c. after the debts and legacies paid; one of them died, and his administrator sued the surviving executor, to have a moiety of the surplufage. The defendant insisted they were joint devisees, and took the residue as legatees, and not as joint executors. Lord keeper decreed *pro quer'*, for in case of executors the testator intended an equal share to his executors: and by chief justice Roll's advice it was decreed, that where a devise was to two equally, notwithstanding the word *equally*, the devisees were jointenants, yet the intention prevents the survivorship: the cause was disputed, but to the dissatisfaction of the bar decreed; for where the intention is secret and not declared, the secret intention must give way to the legal intent. 1 Chan. Ca. 238, 239.

2. The case was, The father seised in fee, mortgaged the lands, and also gave a statute to pay, &c. and made his will, and devised 500*l.* to his daughter and died; the mortgagee took so much of the personal estate in execution on the statute, that there was not sufficient assets left to pay the legacy; decreed the daughter should have relief against the heir, he being eased out of the personal estate, which was liable to her legacy. Lord chancellor: Where the heir is indebted by mortgage made by his father, or by other means as heir to his ancestor, the personal estate in the hands of the executor shall be employed in ease of the heir; but if no assets to pay other creditors, or other end of the testator, or his legacies, the heir shall not turn his charge on the personal estate. In this case here was sufficient to pay the debt by the mortgage, &c. and the legacy out of the personal estate, and when both can be satisfied, both shall be satisfied, and the contrivance to make the personal estate liable towards satisfaction of the mortgage (looks like a fraud) and shall not prejudice the legatee, but she shall have recompence against or upon the mortgage, though originally not liable to her. And my lord cited several precedents decreed upon the same reason. 2 Chan. Ca. 4, 5.

3. Privacy in making a will, or loose words to hide the testator's intent, or to keep the family quiet, &c. are not to be regarded, much less to be taken to amount to a revocation. 3 Chan. Ca. 81, 82, 88, 117, 127.

4. See rules, *Equity to execute the intent of the parties. Law regards the intent of the parties.*

208. *Intent without act not punishable.*

1. **T**HE purpose or intent of a man without act, is not punishable by law; *ubi non est lex, ibi non est transgressio, quoad mundum.* 4 Co. 16.

God only can search the heart, and know the thoughts of man; for the thoughts of man are deceitful above measure, much less can one man dive into the thoughts of another; for they are unsearchable and past finding out

out, nothing being more inconstant and deceitful, so as they can only be guessed at by overt acts, and that with great incertainty, and therefore human laws can go no further than to judge of the intent by the act.

2. See rules, *Law regards the intent of the parties.* *Usury odious in law.* *Equity is to execute the intent of the parties.*

209. *Interest reipublicae ne maleficia remaneant impunita.*

General.

1. *P*ereat unus ne pereant omnes. 4 Co. 124. b.

Particular cases.

2. The defendant prayed that several notes or writings, appearing to be forged by the plaintiff in the defendant's name, might be torn or obliterated. The solicitor general said that it could not be, but that they must be kept, that the king may proceed against the criminal. 1 Vern. 66.

3. On a *Certiorari* was returned a conviction upon 43 Eliz. cap. 7. setting forth, *Whereas complaint has been made unto us, &c. by Sir R. B. that the defendant in the night-time cut down divers lime-trees of the said Sir R. B. &c.* the justices awarded that he should pay so much for damages. The defendant was fined Gent. in the order; and one objection was, that a Gentleman was not within the statute, which speaks of Vagabonds, and such base people, and inflicts a base punishment, viz. whipping, which the law never intended for gentlemen. *Cur'*: Whether the defendant be a gentleman, or not, is not material; for if a man of quality will do a base or mean thing, there is no reason or justice why he should be exempt from the punishment; the quality of the offender is rather an aggravation than a lessening of the offence. Salk. 181, 182.

4. *Spencer*, bishop of *Norwich*, and others, were punished for receiving money, &c. from the *French* king, which drew them without the king's licence, to yield up castles and forts in *France* committed to their custody. 3 Inst. 144.

5. The spiritual court may punish a bishop for any offence against the duty of his office, as a bishop, and as it relates to that; for ecclesiastical persons are subject to the canons; and as the clergy are under different rules and duties, it is reasonable they should be punished in the ecclesiastical courts, and particularly if it be a matter not cognizable at law; and it is reasonable and fit the clergy should have a power to cleanse their own body from scandalous members. *Cawdry's case*, 5 Co. *De jure regis Eccl.* 6. See *Lator's case* in *Dav.* 84. and bishop of *St. David's case* in *Salk.* 294. And as it is reasonable and fit they should thus do, it must be unpardonable if they do not use this power to so good a purpose, &c. 2 Ju. Eccl. 364, 365. See also 1 Lev. 238. and *Rushworth's case* in 1 Ju. Eccl. 526. 2 Ju. Eccl. 323.

6. See *Jenk.* 162, 166. 5 Co. *De jure Eccl.* 27, 28. 4 Inst. 329. 1 Keb. 39. *Hob.* 121. 5 Co. 74. b. 2 Ju. Eccl. 266, &c. 362 to 372.

210. *Interest reipublicae suprema hominum testamenta rata haberi.*

General to, and rules.

1. *Ultima voluntas est legitima dispositio de eo, quod quis post mortem fieri velit.* Swyn. 18. Orph. Leg. sect. 2. And a will hath relation to the testator's death, and not to the making; for till his death he is master of his own will. 2 Ju. Eccl. 35. *Omne testamentum morte consummatum.* Co. Lit. 322. b. *Et ultima voluntas testatoris est perimplenda secundum veram intentionem suam, &c.* Co. Lit. 322. b.
2. It is against the rule of law to make a will void, if by any construction it can be made good. 1 Chan. Ca. 178.
3. It is a rule that a general clause in a will is not to prejudice a particular devise. 1 Rep. Chan. 145.
4. *In testamentis ratio tacita non debet considerari, sed verba solum spectari debent;* for multa possunt movere mentem testatoris quae nos latent, ideo per divinationem mentis durum est a verbis recedere. 2 Chan. Ca. 155.
5. The will is to be taken together as one intire scheme. 2 Mod. Ca. Acherly and Vernon's case, and fo. 77. Nels. 27.
6. No words are to be rejected that are capable of signification. 2 Mod. Ca. 157, &c. 1 Chan. Ca. 178. Pop. 131. Gilb. 11, 118, 133, 136, 209.
7. The testator's intent is to govern, and artificial reason not to be admitted, *ibid.* and 1 Chan. Ca. 79, 80, 178. Sparrow and Shaw's case, 2 Ju. Eccl. 44. case 9.
8. The heir is to be favoured in doubtful cases. See rule, *Heir favoured in doubtful cases.* 2 Ju. Eccl. 44, 45. cases 8. 10.

Particular cases.

9. A man seised of certain lands held in socage, had issue two daughters, A. and B. and devised all his lands to A. and her heirs, to pay unto B. a certain sum of money at a certain day and place; the money was not paid. And it was adjudged, that these words, *To pay, &c.* did amount in a will to a condition, and the reason was, because the land was devised to A. for that purpose, otherwise B. to whom the money was appointed to be paid, should be remediless, *et interest reipublicae, &c.* and the lessee of B. recovered the moiety of the land in ejectment. Co. Lit. 236. b.
10. A man devises several specific legacies, and (*int' al'*) to his grand-children, to be paid at 21 or marriage; and after devises *that all his legacies shall be paid in a year after his decease.* Cur': The subsequent clause which seems to contradict the payment of the legacies to the grand-children, in point of time, must be so construed that it be not repugnant to the former clause; and therefore the latter clause must relate only to the other specific legacies given to the other legatees, and not to the grand-children's legacies. 2 Mod. Ca. 154, 57, 58. See Cro. Ca. 293.
- * 11. A man devises 100 l. a-piece to his two grand-daughters, remitting all due to him for their maintenance; education is included. See case *Anstis*,

flis, Esq; Garter, against *Gandy et ux'*, 27 March 1734-5, before the house of lords.

* 12. A defect in a surrender of a copyhold to the use of a last will, supplied, especially where it is for the benefit of the devisor's children. See case before the house of lords *Lloyd versus Barton*, 18 Feb. 1715.

13. Equity will imply a trust in a will where there is fraud. *Gilb.* 208, 209.

14. Wills to pious uses are favoured. *Gilb.* 44. So in favour of testator's children. *Nelf.* 159, 160.

15. It is a good will, tho' made in form of an indenture. 1 *Chan. Ca.* 248. *Nelf.* 195. S. C. But a will is not good, *sine animo disponenti*, nor a testament *sine animo testandi*. *Swin.* 19.

16. Words in a will transposed in support of contingent remainders, where the devisor so intended. 2 *Chan. Ca.* 10, 11.

17. The witnesses to a will, even under the statute of frauds, need not sign all at the same time or place, or in one another's presence. *Gilb.* 262, &c.

211. *In testamentis ratio tacita non debet considerari, sed verba solum spectari debent; ideo per divinationem mentis durum est a verbis recedere.*

How to be construed according to the intent of the testator.

General.

1. **T**HE testator's intent is to govern, and artificial reason not to be admitted. 1 *Chan. Ca.* 79.

2. And it must not be made void if by any construction of law, it can be made good. 1 *Chan. Ca.* 178.

3. *Voluntas donatoris est observanda.* *Poph.* 132.

Consonant to the rules of law.

4. The intention of the testator is to be pursued in the construction of wills, as far as may be consistent with the rules of law. 2 *Ju. Eccl.* 45.

5. Forasmuch as in testaments the principal point to be considered, is the intent of the testator, the words ought to be so construed, and applied to perform it. Reason and the duty of the judges require that there be such exposition of the words made, that the intent of the testator and the law of the realm be observed. And this consonant to law and good equity. *Plow. Com.* 523. b.

6. A remainder cannot be limited to depend upon a fee-simple. A man may dispose at his will and pleasure, *so as it be according to the rules of law.* *Cro. Eliz.* 525, 526. But one may not devise against the rules of law. *Ibid.*

7. *J. T.* devised all his lands and goods, after his debts and legacies paid, to *R. Toby* and *Mary* his children, equally to be divided between them. Resolved, 1st, That only an estate for life passed; for though the devise

of the lands and goods are coupled together, and it is a devise of the goods for ever; yet for the lands, there being no words to pass an inheritance, only an estate for life passeth; and tho' it was objected that the devise of the lands was after his debts and legacies paid; so that this is limited after he hath made an end of disposing; and was made to his children, of which his heir was one; so as that he intended to give as much to one as to another; yet the court held only an estate for life passed. *Popham* said it may be doubted if any land did pass, in case he had a term for years in land, and so the devise of lands supplied; and that only the term shall pass. 2dly, They all conceived it was a joint estate, and that they should not take in common, for he doth not appoint a division to be made; but *Fenner* said, that 2 *Eliz.* between *Hyde* and *Southcoat*, it was adjudged that a devise of lands to be equally divided was a tenancy in common, but here it is to two to be equally divided, and it is not certain that a division shall be made. *Cro. Eliz.* 330. *ideo quaere.* Vide 3 *Co.* 39. *b.*

To be collected from the will itself.

8. The intent of the testator is to be collected out of the written words, and nothing is to be admitted, in the construction which is in any wise contrary to the words; neither are words to be rejected which may be reduced to any legal construction; yet if any words are contrary to law or insensible such words must be rejected. 1 *Chan. Ca.* 79, 80, 178.

To be taken together.

9. The will is to be taken together as one intire scheme. 2 *Mod. Ca.* 68 to 80. *Nell.* 27.
10. A general clause in a will is not to prejudice a particular devise. 1 *Rep. Chan.* 145.

Words to be transposed.

11. One seised in fee of lands, deviseth to another and his heirs; and after in the last part of his will deviseth a rent to another of 40s. out of the lands, with a clause of distress; this is a good devise of the rent to one, and of the land to another; and yet the land was first devised. For it is the office of the court, so to place the words spoken at one time, as that one part may stand with the other; and that the devise of the rent shall precede the devise of the land, and so all repugnancy be avoided. So where one devised a lease for years to his son during all the term, but yet that his wife should have it during her life: this was a good devise to the wife of the term, for so long as she should live, and yet at first he gave all to the son; but the court is so to expound the words, that the intent of the testator may be observed; and that was, that the wife should first have the term during her life, the son after. And so the words of gift to the son, which were first, shall be last placed in the sense; and the words for the wife, which were subsequent, shall precede in construction. *Plow. Com.* 523. *a.*

Where

Where ambiguous.

12. *Walmesley*: It is a good way, when the words in a will are ambiguous, so as the intent may not be collected, to expound the will according to the law, and so there shall not be any prejudice. *Cro. Eliz.* 743.

13. Without words of condition, the judges have expounded the will to make a condition; where the intent of the testator was such. *Plow. Com.* 523. b.

14. If a man hath lands in fee, and other lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years: and if a man hath a lease for years and no fee-simple lands, and deviseth all his lands and tenements, the lease for years passeth; for otherwise the will should be merely void. *Cro. Ca.* 293.

15. See last rule, case 10.

*Where uncertain.**General.*

16. A will must be construed according to the intent of the deviser, where a certain intent may be collected; but where it is uncertain, it is void. And the intent of the deviser ought to be collected from plain words, and not from words which ingender confusion; and if it may not be collected by the words it is void. *Cro. Eliz.* 743.

Particular.

17. A devise to two and *haeredibus*, so to *melioribus hominibus* in *D.* is void, for the uncertainty; for it cannot be known whom he intended to be the best men. *Cro. Eliz.* 743.

18. One infeoffed his two sons to the use of himself for life, and after to the use of them and their heirs, *ad ultimam voluntatem suam perimplendam*; and after devised to *Sharpe* in fee. *Gaudy* held that *Sharpe* should take nothing; for an use cannot be limited upon an use: but the words *ad performand' ultimam voluntatem* are void; and to that opinion *Clench* agreed, but *Fenner* doubted; wherefore it was adjourned. *Cro. Eliz.* 382, 383.

What a good devise by implication.

19. One deviseth all his goods to his wife, and after her decease, that his son and heir should have the house; though there be no devise by express words made to the wife, but by implication only, as the heir may not have it during the life of the wife, she shall have it for life, according to the intent of the deviser. *Plow. Com.* 522. a. b.

The heir to be favoured.

20. The words in a will being ambiguous, and capable of a construction in favour of the heir, is to be so construed. 2 *Ju. Eccl.* 44.

21. Agreed by all the judges, that the words in a will, which disinherit the heir at common law, ought to have an apparent intent, and not to be ambiguous and doubtful; and that the intent ought to be collected out of the

the words of the will; and not from any foreign intendment or averment. *Cro. Ca.* 369.

22. The devisor supposing he had power to dispose of the inheritance, deviseth the same, and ordereth incumbrances to be discharged thereout; afterwards it turning out that the estate could not pass according to the devisor's intention, it shall not, though in favour of the heir, be construed he intended to saddle his other estate with these incumbrances. 2 *Ju. Eccl.* 45.

23. *Ejectione firmæ*, special verdict found, wherein the case was, *Bishop* being seised of divers lands called *Hayes* lands, extending into two villis *Cokefield* and *Cromesfield*, devised all his lands in *Cokefield*, called *Hayes* lands, to *J.* his youngest son, and his heirs; and after, in another part of his will, he willeth, that if his son *J.* dieth without issue, that his wife should have *Hayes* lands, and dieth; *J.* also dieth without issue. And whether the feme shall have *Hayes* lands in *Cromesfield*, or only that in *Cokefield*, was the question? And it was resolved by the whole court, that she should only have that which was in *Cokefield*; because there was no more devised to the youngest. But *Popham* said, if the devise had been to the eldest son, and that if he died *sans* issue, that his wife should have *Hayes* lands; there peradventure she should have all, because the eldest son had all; the one part by devise, the other by descent; and she should have all which he had; wherefore it was adjudged accordingly. *Cro. Eliz.* 674.

24. See rule, *Ultima voluntas testatoris est perimplenda secundum veram intentionem suam.*

25. See also 1 *Chan. Ca.* 60, 166. *Mo.* 145. 2 *Chan. Ca.* 155. 3 *Chan. Ca.* 81, 87, 88. 3 *Chan. Ca.* 117, 127. 10 *H.* 8. 9. 1 *Inst.* 9. 1 *Mod.* 57. 3 *Lev.* 71, 304. 1 *Jo.* 137. *Lat.* 34. 9. 2 *Lev.* 15, 104. 1 *Mod.* 189. *Salk.* 228, 237, 231, 347. *Yelv.* 73. 2 *Leon.* 147, 221. 3 *Leon.* 78. *Plow.* 28, 344. 2 *Mod. Ca.* 57, 58, 77. *Poph.* 131, 132, 144. *Gilb.* 11, 118, 131, 136, 209. 1 *Chan. Ca.* 309. *And.* 29. 3 *Lev.* 180, 181, 373. 3 *Mod.* 290. 2 *Lev.* 56, 156. 3 *Cro.* 52. 1 *Cro.* 356. *Lat.* 40. 2 *Chan. Ca.* 10, 11, 155. *Nels.* 27, 159, 160, 354, 403, 433. 3 *Cro.* 359, 679. 2 *Vern.* 545. 2 *Sid.* 126, 136, 149, 151. 2 *Mod.* 9, 292. 1 *Vern.* 250. *Hob.* 65. 1 *Leon.* 251, 254. *Co. Lit.* 111. a. *Ow.* 141. *Fitzb. Nat. Brev.* 198. b. 3 *Cro.* 128, 387. 2 *Vent.* 368. 1 *Mod.* 272, 308. 1 *Vern.* 30, 199, 208, 246, 302, 332, 381, 431, 468, 470, 512, 522, 538, 546, 553, 573, 620, 638, 653, 666, 667, 686, 740. *Skin.* 147, 182. *Ben.* 35, 204. 2 *Mod. Ca.* 39, 93, 154. *Hob.* 18. 3 *Co.* 20. b.

212. In things of election the party is to shew that he hath made it.

Election.

Of estate.

1. **T**HREE tenements were devised to the wife in lieu of dower; and after the husband sells one tenement; the feme may take the remainder or dower, but not both; neither shall she have satisfaction for the tenement

nement fold; for she must take the will as it stood at the death of the testator. 2 Chan. Ca. 24.

Of time of payment.

2. This was an action on the case on a promissory note, whereby the defendant promises to pay the plaintiff 23*l.* at the day of marriage of the defendant, or the day of his death; the plaintiff avers the defendant married *Lucy Greave*, whereby the action accrued; the defendant demurred generally; the plaintiff joins. It was objected, that there being two days of payment mentioned (to wit) the day of marriage, and the day of death; and the defendant being to do the first act, that is to pay the money; that he, according to the case of *Sir Rowland Hayward*, 2 Co. 35. has his election on which of the times he will make the payment. Lord chief baron *Gilbert*: I think in this case the defendant has no election, but must pay the money on his marriage; for *Sir Rowland's* case, and all cases upon bonds and promises, turn upon this general rule, *That all contracts are to be taken according to the intent of the parties, expressed by their own words; and if there be any doubt in the sense of these words, such interpretation must be made as is most strong against the grantor or obligor, that he may not, by his own obscure wording of the contract, find means to evade and elude it.* Therefore if a man grants a rent of 20*l.* or a robe to one and his heirs, the grantor shall have the election; for he is the first agent, by the delivery of the one, or the payment of the other, viz. he having, by his contract, undertaken to do the one act or the other, he has still left it in his election to chuse which he will do; but if a man grants a rent-charge to another out of his lands, it is but one act to be done, and the grantee hath two remedies, either by way of distress, or by writ of annuity; for the grantor having granted it out of his lands, he hath charged his lands also; and having thus granted two remedies, it must be in the election of the grantee, who is to have the benefit of these remedies, which he will have. So in the case of *Hill and Grange*, *Plow.* 172. If a man make a lease for years, and reserves a rent payable at *Michaelmas* and *Lady-day*, and there is a condition, that if the rent reserved be behind and unpaid at the said feasts, and ten days after, that then the lessor shall re-enter; the construction of such lease hath been made, that the rent is due at the day, and the lessor may distrain for it; but to save the condition the lessee may tender at the last of the ten days; because those are days of grace, given by the condition, that the lessee may save his estate by the tender; and therefore if he tender at the last of the ten days, it is sufficient; and this is likewise the day for the lessor to demand the rent, in order to have advantage of the condition broken. In the case *Bosvil and Coats*, (1 Vent. 58.) the condition of the bond was, that the obligor should bring the son and daughter of *J. S.* at their full age, to give such releases as a third person should require; the defendant pleads the son alive and under age, to which the plaintiff demurs; and the demurrer allowed; for the force of the condition is not suspended till they are both of age; because it is not to be taken conjunctively but respectively and disjunctively; for the obligor undertakes that the daughter shall release at her full age as well as the son, and if she doth not, the condition is broken. And so universally, when any person undertakes to pay money on two several contingencies; the natural sense of such contract is,

that he must pay it at either of the said contingencies, for the putting of it in, that he shall pay it at the one or the other, is for the benefit of the obligee or promisee, that he may have his money at any of the contingencies happening; and this is the genuine signification of those words, and likewise that which is strongest against the obligor or promissor; for if he would have the payment suspended by both the contingencies, the promissor or obligor must take care, in express words, to limit the payment after the happening of both contingencies. And there is an express resolution in the case of *Sayer and Gleane*, (1 Lev. 54, 55.) in debt on an obligation, that if a ship put to sea, and either the goods or the obligor come safe, he should pay such a sum, over and above the use allowed by the statute; the defendant pleaded, that the obligor died before he returned. And it was objected, that the defendant had an election to pay at which of the contingencies he would; and that therefore the executors of the obligor were excused, because their testator never returned safe. But it was resolved, that the law supplies the words, *which should first happen*, and no prejudice to the executors of the obligor, because it was the sense of such contract, that payment should arise on either of the contingencies; but it is much stronger in this case; because the promise is to pay at the day of marriage, or day of death; now if the payment were not to be made at the day of marriage, that part of the promise were vain and idle, and to no purpose; for since 'tis certain all must die, the putting into the contract *the day of marriage*, would be altogether insignificant, since, according to the defendant's exposition, the payment could not be made on the day of marriage of the defendant, but must wait till the time of his death; and therefore judgment must be for the plaintiff. *Gilb.* 249, 250, 251.

Of remedies, and how to proceed, and where general.

3. The plaintiff shall not be put to election before an answer put in. 1 *Vern.* 103.

4. A plaintiff here may elect either generally to proceed here or at law; or specially to proceed for part here, and the other part at law; but the court will judge of the reasonableness of such election. *Gilb.* 183.

Either in one court of equity or another.

5. The bill was brought here, and a plea to it allowed; the plaintiff declines it, and brings a new bill in the exchequer for the same matter; the plaintiff was ordered to elect in which court he would proceed; and if he elect to proceed *in Scac'* his bill here is to be dismissed; if in this court, then an injunction is to be awarded to stay his proceedings *in Scac'*, *nisi causa*. 2 Rep. Chan. 2.

Either at law or in equity.

6. Where the plaintiff has a remedy to obtain the possession of goods by trover, yet if those goods were only by way of security, and consequently there is a matter of account, the plaintiff is proper in taking his remedy here. *Barn.* 30. The same is where a pledge is of goods, or where there is a mortgage, the party is at liberty to take his remedy here, if he thinks proper. *Barn.* 39.

7. By

7. By the antient course of the court, a person might bring his action at law against the representative of the deceased, and also his bill here for a discovery of assets. Though now his lordship said it was established, that if the party proceeds in equity, it must be both for discovery and relief, and not to proceed both at law and in equity. *So that the antient course is altered, and sure with great reason, as equity on a discovery may relieve and prevent a double vexation and expence; for discovery could only be in equity, and this means prevents the party the trouble of seeking relief at law on discovery made here.* And where the party hath proceeded in both courts, several orders have been made, driving him to his election; and it is a general rule, that a person shall not be allowed to proceed both at law and in equity for one and the same demand at the same time. But his lordship also declared, that where the court sees that the representative is confessing judgments, that is a reason, that the court will not require the party to make his election, &c. And his lordship observed the present case was, that the original bill was filed 31 October, and the answer came in 27 November following; and in the beginning of Michaelmas term a judgment was confessed to Murray for 4000*l.* and that the administration was in some measure granted to the defendant by leave of this court. The plaintiff had entered a caveat against it, though the same was after withdrawn. His lordship thought it the proper order, that the plaintiff should make a special election, to proceed at law to recover judgment, and here for a discovery, and an account of assets, but that he should not be at liberty to take out execution without leave of this court, and so his lordship was pleased to order. *Barn.* 278, 279.

8. See *Plow. Com.* 501. *b.* 2 *Chan. Ca.* 200. 1 *Chan. Rep.* 44, 52, 55. 2 *Rep. Chan.* 9, 21. 2 *Chan. Ca.* 87, &c. 1 *Vern.* 105, 298, 471. *Barn.* 391.

9. See also rule, *Every man's deed or covenant to be taken most strongly against himself.*

213. Jointenancy odious in equity.

General.

1. **T**HE advantage of survivorship is against equity. 1 *Chan. Ca.* 58. 1 *Vern.* 361. 1 *Rep. Chan.* 261. 1 *Vern.* 271. 2 *Chan. Ca.* 64, 65. 1 *Vern.* 425.

2. Yet a trust may survive, as is the following case.

Particular cases.

3. Upon a bill in the exchequer, the case was, the father of the defendant Rowel gave instructions for his will to be put in writing, that his messuages and lands should be sold by Howe and another, for payment of his debts and legacies, and made other executors, and died, without making any other publication of his will. One of the trustees for sale died before any sale, and now the survivor and the heir were compelled to sell, because the lands were tied with a trust which will survive in equity. *Hard.* 204. *Lit. se&c.* 169. *Co. Lit.* 112. *b.* 113. *a.* *Dy.* 371. 1 *Chan. Ca.* *Margin* 295.

4. One having devised the surplus of his estate, after debts paid, to *A.* and *B.* *B.* dies. It was adjudged in the delegates, and decreed by lord *North*, and now confirmed by the lord chancellor, that it was a joint devise, and should survive to *A.* And his lordship's opinion was further, that if *A.* and *B.* had been executors, and *A.* had possessed a moiety of the goods, and died, it would have been all one. And the case of *Cox* and *Quaintock*, was cited, where there were two joint executors, and one died, adjudged his executor or administrator should not have an account against the survivor. 1 *Vern.* 482. But *Note*; The case *Cox* and *Quaintock* (which see 1 *Chan. Ca.* 238. *Finch C. B.* 176.) was decreed to the dissatisfaction of the bar; for where the intention is secret and not declared, the secret intent must give way to the legal intent. And if an administrator, then an administrator *de bonis non* must have it.

5. Three persons being jointly interested in the trust of a term for years; one of them mortgaged his third part, and the question was, Whether the jointenancy was severed? And it was determined to be a settled point in chancery, that if *H.* makes his will, and devises his lands to one in fee, and after mortgages it to another in fee, this is not a total revocation, but the equity of redemption shall pass by this devise. But *Cowper* lord chancellor held, that jointenancy is odious in equity; and that as to the case of the will, it might be for the benefit of the mortgagor, that his will should not be revoked; but that it is to the disadvantage of the mortgagor that the jointenancy should continue; because if it happen he should die first, all his interest goes from his representatives to the survivor, unless it shall be construed a severance. *Salk.* 158.

6. Two persons having jointly stock'd a farm and occupied as jointenants, the bill was to be relieved against survivorship, one being dead; and though it was actually proved in the cause, that the deceased was informed what the consequence of the law was in case he should die, and that he thereupon replied he was content the stock should survive; yet the lord keeper was clear of opinion that the plaintiff ought to be relieved; and said, if the farm had been jointly taken by them, and proved a good bargain, there the survivor should have had the benefit of it: but as to a stock employed in way of trade, that should in no case survive; the custom of merchants as to bills of exchange, is now extended to inland bills; and the custom of merchants is extended to all traders to exclude survivorship; and though it is common for traders in articles of copartnership to provide against survivorship, yet that is more than is necessary; and he said, he took the distinction to be, where two become jointenants or jointly interested in a thing by way of gift or the like, there the same shall be subject to the consequences of law; but as to a joint undertaking, as in the way of trade or the like, it is otherwise. And decreed for the plaintiff accordingly. 1 *Vern.* 217.

7. *Thomas Goodwin* being possessed of several leasehold houses for several terms for years, makes his will, and thereby devises the same to *Anne* his wife for her life; and after her death he gives and devises the same to *Alice Buinian* and her three sons, to be equally amongst them; it was decreed they took as tenants in common, though there was no mention of any division to be made, or equally to be divided between them; accordingly the plaintiff, who was administrator of *Alice Buinian*, and had brought this

this bill for an account of the profits, had a decree for an account of the fourth part of the rents and profits for the time to come. *Gilb.* 146, 147.

8. See 1 *Vern.* 32, 35, 353, 482. *Cro. Eliz.* 743. 2 *Vern.* 63, 385, 557. *Dy.* 371. *Co. Lit.* 112, 113. *Prec. Chan.* 491, 163, 164, 167, 168. *Skin.* 182. 1 *Pe. Will.* 96, 28, &c. 2 *Show.* 91. *Cro. Ca.* 57. *Cro. Jac.* 416. *Prec. Chan.* 332. 1 *Pe. Will.* 14, 21. *Barn.* 396. *Doct. & Stud. lib.* 2. cap. 25. *Prec. Chan.* 120, 121, 124, 332. *Elf. Obs.* 77. *Barn.* 423.

214. Jointure favoured in equity.

As to value.

* 1. **M**Arriage articles recite that the lands covenanted to be settled, were 500 *l.* a year; though there was no express covenant that they were so, yet decreed the deficiency to be made up. See case before the house of lords, *Glegg and Glegg*, 14 May 1728.

2. This bill was to have a jointure which was defective in value made good, the husband having covenanted that the lands were of 400 *l.* *per ann.* value, whereas in truth they were but 350 *l.* decreed the covenant should be performed in specie according to the value then, and not as they are now; lands being every where fallen. But if the covenant had been 400 *l.* *per annum*, and should so continue, then they should have been made up to the present time; it was said for the defendant, that this value was only in the first articles, and not in the settlement, where there is no covenant as to the value; and that the plaintiff ought not to revert back from the settlement to the articles, as the settlement was executed in lieu of them; and though the plaintiff was an infant then, and so it was not her deed, yet her father accepted it for her. *Sed non allocatur.* 1 *Vern.* 217. *Prec. Chan.* 369. *Abr. Eq.* 221. case 8.

Jointress not to discover or part with writings.

3. The plaintiff, heir at law, brought this his bill for the deeds and writings, which he alledged concerned his estate. The defendant insisted she had a jointure of part, so ought not to discover or part with the writings until her jointure was confirmed. *Cur'*: Confirm her jointure, or you shall not see the deeds. 1 *Vern.* 479. 2 *Vern.* 701.

Title evicted.

4. A term may be set aside to let a jointress into her jointure; *aliter* of a dowress. *Prec. Chan.* 65, 97.

5. If *J. S.* gives a voluntary bond after marriage to make a jointure on his wife, and does it accordingly, whereupon she gives up the bond; the husband dies, and the wife is evicted, the jointure shall be made good out of the personal estate, there being no creditors; for the delivering up of the bond by a feme covert could no way bind her. 1 *Vern.* 427.

Agreements to be performed in specie in favour of a jointress.

6. *J. S.* before marriage articles to settle a jointure, and the marriage is after in confidence thereof had, but the husband dies before the settlement made; execution of the articles decreed. 2 *Vent.* 343.

7. *A.* in consideration of a marriage portion, articles to settle a jointure, but dies before the portion paid, or any settlement made; the wife administers, and so intitles herself to the money, and brings her bill against the heir to have the jointure. She shall have no relief, for she ought not to have both. But the reporter puts a *quaere*, she being intitled to these several demands in distinct capacities, and debts may hereafter appear to exhaust the assets; and in case the husband had actually received the portion, she would have had it as his administratrix. 1 *Vern.* 463.

8. *A.* on his first marriage, settles to the use of himself for life; remainder to his first and other sons in tail; the wife dies without issue. *A.* on his second marriage, in consideration of a portion paid, agrees to settle part of these lands, as a jointure, on such second wife; the court will set aside the first settlement as fraudulent against the jointress, who is a purchaser for a valuable consideration. 1 *Chan. Ca.* 100. See *Show.* 350.

Resulting trust for her.

9. If a feme joins with her husband in a fine and mortgage of her jointure lands, there results a trust for her when the mortgage is paid, to have the lands. 2 *Chan. Ca.* 161. So she may redeem, and if she pays more than a third of the principal, her executor may hold till reimbursed.

10. So if a jointure is made of lands in mortgage, she may redeem, and her executor shall hold over till repaid with interest. 2 *Vent.* 343.

Construction for her.

11. *A.* being seised in fee, by indenture, in consideration of marriage of his son, covenanted to levy a fine to certain uses, but none was levied; after he made his will, reciting this deed in his will, and deviseth and confirmeth all estates given and granted to his son in marriage according to the said deed. Resolved, The will had reference to the deed, and passed the lands and estates as were intended to be conveyed by the deed and fine, &c. *Show.* 350. *Salk.* tit. *Devise.* Vide *Cro. Eliz.* 68. *Cro. Jac.* 148.

12. See 2 *Chan. Ca.* 98. *Prec. Chan.* 65, 97, 369. *Nelf.* 388.

13. See also rules, *Law regards the intent of the parties, &c. Equity to execute the intent, &c. Heir favoured.*

215. *Ipsae etenim leges cupiunt ut jure regantur.*

1. **F**Orasmuch as the chancery bridleth the rigour of the common law, by giving actions and exceptions for remedies where by law none were, according to equity and conscience, to maintain *aequum et bonum*, the common people term the chancery the court of conscience, yet herein conscience is so regarded, that law be not neglected; for they must join hands in the moderation of extremity; *ipsae etenim leges cupiunt ut jure regantur, id est, ut levi, facili ac benigna interpretatione temperentur, verique dicitur nullus recedat a cancellaria sine remedio.* 4 *H.* 7. 4. 2 *West's Prec.* 176. b.

2. See *Co. Lit.* 166. b. 167. a. b. *Hob.* 107.

3. See also rule, *Cujus est divisio alterius est electio*, case 1.

216. *It*

216. *It is the office of temporal judges to advance laws made for religion, according to their end, though the words be short and imperfect.*

General.

1. **T**HE king's temporal courts have power derived from the crown, to suspend the proceedings of the ecclesiastical courts by prohibition, premunire, &c. if cause. *Ha. Anal.* 20.

2. And they must always have an eye that the ecclesiastical jurisdiction usurp not upon the temporal. *2 Inst.* 615.

3. And the temporal judges are not bound by the rules of the civil law, but are at liberty to follow their own rules, where the two laws differ. *1 Pe. Will.* 12.

4. And it is their office to advance all such laws as are made for religion, according to their end, though the words be short and imperfect. *Hob.* 157. See *Magdalen College's case*, *11 Co.* 66. and *2 Inst.* 615, 616.

5. For when any thing is used to the displeasure of God, it hurteth not only the body but the soul. And temporal rulers have not only the cure of the body but also of the soul, and shall answer for them if they perish in their default. *Doct. & Stud. lib.* 1. cap. 32.

6. The judges and sages of the law, for matters in law, are called *Concilium regis*. *Co. Lit.* 304. a. b. *Hob.* 163. And the lord chancellor is keeper of the king's conscience, and controuls both courts of law and the ecclesiastical courts. *1 Chan. Ca.* 203. *Gilb.* 1. *1 Ju. Eccl.* 526.

7. If the ecclesiastical judges act contrary to law, may not this court (*B. R.*) oblige them to act according to, or to pursue the law? Is there any difference between granting a prohibition to stop them going wrong, and a *Mandamus* to guide them right? *1 Pe. Will.* 47. The ecclesiastical judges are in conscience bound to know the temporal laws. *Doct. & Stud. lib.* 1. cap. 20. lib. 2. cap. 25. *1 Pe. Will.* 12.

Particular cases.

8. If one be imprisoned by ecclesiastical authority, on complaint to the temporal courts, that he is imprisoned without cause, the temporal courts will send to have the body, and to be certified of the cause, which if the ecclesiastical courts do not, the temporal courts do and ought to deliver him; for where the temporal judges see not a just cause of the party's imprisonment by the ecclesiastical courts, the temporal judges (as being bound by oath) are to deliver him. *2 Inst.* 615, 616. *4 Inst.* 329.

9. Where this court (chancery) sees reason to think there will be a misapplication of the intestate's estate, and an abuse and wasting to the prejudice of an infant by a limited administrator, who is only a trustee for the infant; this court is to take care that the infant be not prejudiced, &c. *2 Ju. Eccl.* 108. See *The whole case much excellent matter.*

The king bound by such laws.

10. In several cases the king is bound by acts of parliament, though not named in them nor bound by express words; as in all statutes made to suppress wrong, to take away fraud, or to prevent the decay of religion; for religion, justice and truth are the supporters of the crowns and diadems of kings. And therefore, it was agreed 35 H. 6. 60. that the king shall be bound by the statute W. 2. cap. 5. which was provided against tortious usurpations, though he be not named in the statute. So in lord Berkley's case, Plow. it is adjudged if a gift in tail be made to the king, he may not alien to defraud him in reversion, or his issue, but he is bound by the statute *de donis*, and the act 1 Eliz. to restrain ecclesiastics from wasting their possessions, which were given to maintain the service of God, shall bind the crown, unless special provision had been made by the same act to the contrary. *Et summa est ratio quae pro religione facit.* 5 Co. 14. a. b. The king being head of the commonwealth, may not be an instrument to defeat the provision of an act of parliament made *pro bono publico*. 15. b.

11. It was unanimously resolved by the judges, That the act 13 Eliz. extended to restrain the master and fellows from conveying their possessions to the queen, tho' she is not named expressly in the same act; for the general letter of the act extends to her; and if she should be exempted, it ought to be by construction of law, which cannot be for the reasons in the said act, viz. the queen, lords and commons, have adjudged, as appears in the preamble, long leases made by colleges, &c. are against reason; *a fortiori* estates in fee-simple, &c. and the law, which is the perfection of reason, may not expound acts of parliament against reason. 2. The law hath adjudged these causes of dilapidations, to be to the decay of all spiritual livings, to the decay of hospitality, and the utter impoverishing of successors, upon all which must ensue fearful and dangerous consequences, viz. the decay of true religion, and the spiritual worship of God, &c. great ignorance of religion, and decay of christian profession; for none will apply himself, or his sons, or those committed to his charge, to the study of divinity for nothing; and therefore it was unanimously resolved, that the statute which provides for the maintenance of religion, the advancement of sound learning, and the relief of the poor, shall be extended generally according to the words, and shall bind the crown; and particularly this act 13 Eliz. which so provides. And out of these colleges, deans and chapters, &c. the church is as well furnished with grave and learned divines, for the instruction of the people in the true religion, as the commonwealth with learned men for better administration of justice, as well temporal as ecclesiastical, which (true religion and justice) are the main pillars which support the crown and king; and therefore of all others the king who is *persona mixta, medicus regni, pater patriae, et sponsus regni*, who *per annulum* is espoused to the realm at his coronation, shall not be exempt out of this act by construction of law; as it would be against reason, cause dilapidations, to the decay of spiritual livings, of hospitality, and to the utter impoverishing of successors; and by consequence draw on a decay of religion and justice; and therefore true it is, *quod summa ratio est quae pro religione facit*, and West. 1. ult. *Summa charitas est facere justitiam singulis, et omni tempore quando necesse fuerit*, which is to be understood, that the law will never presume that any one

will do any thing against religion or any religious duties, &c. so in the case at bar the law shall never make any construction against the maintenance of religion, advancement of learning, and maintenance of the poor, as the *Stat. 1 & 2 Ph. & Ma. cap. 8.* made for these ends, ought to be favourably expounded to bind the crown, &c. *11 Co. 70. a. b. 71. a. b.* The king is the fountain of justice and common right, he is God's vicegerent, and as such can do no wrong. *Rex hoc non potest facere, quod non potest injuste agere.* Where a necessary and profitable remedy is provided by any act, and for the suppression of tort, it shall bind the king, as *Stat. 13 E. 4.* and *Stat. De donis, &c. 11 Co. Magdalen College's case; vue tout le casé.*

12. See *Hob. 147, 157. Jenk. 162, 166, 233. 4 Co. 124. 4 Inst. 329. 2 Inst. 615, 616. 2 Chan. Ca. 18. 1 Ro. 452. 1 Ju. Eccl. 158, 160, &c. 327, 352, 353, 369, 429, &c.*

217. *Judicandum est legibus non exemplis.*

1. *I*T must needs be, that examples not founded in law can never be lawful; so this rule needs no comment; for though *communis error facit quasi jus*, yet it is but quasi, and when the mists of error are dissipated, the meer appearances or shadows of law also vanish.

2. See *Vaugh. 27. Hob.*

3. See also rule, *Communis error facit quasi jus.*

218. *Judges in England are expositors of the Irish laws.*

SEE rule, *Chancery not to be ousted of its jurisdiction.*

219. *Judges have always suppressed new and subtile inventions in derogation of the common law.*

General.

1. *T*HE wisdom of the judges and sages of the law hath always suppressed new and subtile inventions in derogation of the common law; and therefore the judges say in one book, We will not change the law which always hath been used; and in another, It is better that it be turned to a default, than the law should be changed, or any innovation made. *Co. Lit. 282. b.*

Particular cases.

2. Case upon the custom of merchants, and declared that the defendant *per notam sive billam secundum consuetudinem* promised to pay sixty guineas to the plaintiff, if the plaintiff should be married within two months, and avers that he was married, &c. The defendant demurs. The court inclined against the custom; this not being by way of negotiation, but a note to pay money upon a meer contingency, which by this artifice they would make equal with a bond, and not set forth any consideration; and they said

said it is the duty of the judges to suppress new inventions. *Comb.* 227, 228. See *Gilb.* 249, &c.

3. See rule, *In things of election the party is to shew that he hath made it.* *Div. of time of payment.*

220. *Judicium semper pro veritate accipitur.*

Judgment, *Judicium*, *quasi juris dictum*, the very voice of law and right, therefore *Judicium semper pro veritate accipitur*. The antient words of judgment are very significant, *consideratum est*; because the judgment is always given by the court upon due consideration had of the record before them, &c. *Co. Lit.* 39. Some judgments are final, and some not. *Ibid.*

221. *Jura ecclesiastica sunt limitata.*

General to the common law.

1. THE common law is the most antient and fundamental law of the land. And

Ecclesiastical laws, from whence.

2. The privileges of the church derive themselves only from the indulgence and favour of princes, and had no foundation in the antient common law; and though the privileges of the church are confirmed by divers acts of parliament, yet that hinders not, but that there was an antient common law in which they, *the spiritual or ecclesiastical laws*, had no bottom; so that the law of holy church had bounds set to it. *Hard.* 63. *And these pompous, bigg, swelling names, are little, if any thing more, than mere empty sounds, conjured up by those who have made it their interest, to awe the ignorant, and wanton in the fruits of falsehood and deceit.*

3. These laws and courts derive their existence from the favour of princes, and acceptance of countries, for the gracing of ecclesiastical persons set over the church, by and under such princes, *and temporal governors*; and in such countries where they were so allowed; and particularly in these kingdoms, they owe their jurisdiction to the favour and condescension of our sovereigns and the reception of the people, and not to any inherent authority in the church, or prelates or other subordinate governors thereof. 1 *Ju. Eccl.* 168, 169. *Jura ecclesiastica sunt limitata*, 169. The ecclesiastical jurisdiction is limited to certain spiritual and particular cases. And the courts in which these causes are heard, are called *Fora ecclesiastica*. *Co. Lit.* 96. a. *And as this jurisdiction flows from this beginning, the pretence of its being of divine original, can only grow from one of these two causes, namely, either gross and willful ignorance, or set purpose to deceive.*

How restrained.

Particular means.

By prohibition.

4. A prohibition lies to the ecclesiastical court, for denying a copy of the libel; for *jura ecclesiastica sunt limitata*, and the party, in common honesty, ought to know whether the matter be within their jurisdiction, and how he is to answer? 1 Ro. 337. So it is where these courts take undue means to enforce their sentences. Ro. Abr. 302. So where they pay not a due regard to the king's pardon. See 1 Ju. Eccl. 342 to 349, inclusive. So where they act oppressively. 1 Ju. Eccl. 349 to 351, inclusive. So where they either cannot administer right, want jurisdiction, or exceed their jurisdiction. 1 Ju. Eccl. 351 to 359. For other particular cases, when and where these courts are restrainable by the temporal courts, and where they may be, and how punished, &c. see 1 Ju. Eccl. 425, to the end, and the second Volume throughout. And as for the particular method of proceeding in the prohibition, see 1 Ju. Eccl. 363 to 392, inclusive.

By praemunire.

5. For what this offence is, the heinousness of it, from what cause it first grew, and by what laws, and how punishable, and the method of proceeding in it, see 1 Ju. Eccl. tit. *The pope an usurper; The course of ecclesiastical usurpation; The oppositions the same have met with, and Praemunire* throughout.

6. And as these courts are thus to be restrained or enjoined in many cases, so it may not be improper to add here, that they also may be commanded and enforced to their duty, in cases where they refuse to do justice to their suitors; and that, by Mandamus from the king's temporal courts. See 2 Inst. 615, 616. 4 Inst. 329. 1 Pe. Will. 47. Gilb. 208. Skin. 101, 176. 1 Vent. 5. Fitzh. Nat. Brev. 44. (H.) 5 Co. De Ju. Regis Eccl. 23. b. 14 H. 4. 14. 2 Inst. 623. 3 Ass. pl. 19. 1 Sid. 403. Doct. & Stud. lib. 2. cap. 32. Salk. 553, 468. 3 Mod. 335. 1 Ju. Eccl. 351, cap. 4. 430. ca. 2, 3, 4. 431. ca. 4, 5. 2 Ju. Eccl. 96, &c. 98, &c. 72. Justice and Jones's case, 278. The King and Wheeler's case, 196. The King and Walker's case, 288. Speak and Born's case, 304. Pritchard's case, also the next case, 305. Comberbach's case, 323. The King and The Bishop of Litchfield and Coventry.

222. *Jura naturae sunt immutabilia.*

What and how, to be considered.

1. **T**HE law of nature may be considered in two manners. 1st, General. 2dly, Special. 1st, General, when referred to all creatures, reasonable and unreasonable; for unreasonable creatures live under a rule given them by nature, necessary to them. 2dly, When specially considered, which is also the law of reason, it belongs only to reasonable beings,

ings, namely, Man created to the image of God; and this law is binding on all, and is always good and righteous, stirring and inclining a man to good, and abhorring evil, and is written in the heart what is to be done and what avoided; and this is unchangeable; and therefore against this law, prescription, statute nor custom may not prevail; and if any are brought against it, they are void. *Doct. & Stud. lib. 1. cap. 2.*

Particular cases.

2. By the law, regularly femes covert, infants, ideots and lunatics, cannot grant *in pais*; yet if any of them levy a fine, as in *Mary Portington's* case, 10 Co. 42. it binds them also for the uses thereupon declared by the deed, as being a part of the operation of the fine. But note the reason, says lord *Hobart*, which is not because the law binds such persons; for therein *jura naturae sunt immutabilia* still; but clean contrary, because the law finds them persons not disabled, nor admits the averment of such disablement; because it is certified by invincible and indisputable credit of the judge, that they were perfect and able persons; and so here is a law of policy, that doth not cancel the law of nature, but only bounds it in point of form and circumstance, it being better to admit a mischief in particular, even against the law of nature, than an inconvenience in general; and it is not the law of nature to admit any improbable surmise against authentic record or evidence. *Hob. 224.*

3. A benefice with cure could never have been appropriated to women, in truth, though the pope *de facto* made many; for a woman cannot be a pastor by the law of God. 1 Cor. xiv. 34. 1 Tim. ii. 11, 12. *Dyer* in *Grendon's* case says well that it was abominable, and I (lord *Hobart*) say more, that it was against the law of the realm; for *beneficium non datur nisi propter officium*; and these are not capable; and the business is to make the patron and his successors perpetual parsons, which here should be a prioress and her successors, which fails; for *jura naturae sunt immutabilia*. *Hob. 148.*

4. Where the fault of a *commendam* is in its constitution, as in the principal case, and so not warranted by the laws of *commendams*, but is against the very nature of them, it makes it none at all; and so it can bear no execution; for *jura naturae sunt immutabilia*; and if you change its essential form it may be some other thing, but it is not now the same that it was; *omnis forma, per quam quaeque res in propria specie constituitur, perfectio quaedam est: perfectum est cui nihil deest secundum suae perfectionis vel naturae modum*; and to shew that a good execution will not profit where the constitution is defective, see *Mildmay's* case, *Coke lib. 1. 175.* and lord *Paget's* case, 1 Co. 154. *Vernon's* case, *lib. 4. 2. fo Trin. 12 Ja. Rot. 3264. Hob. 151.*

223. *Furare in propria causa est saepenumero, hoc seculo, praecipitium diaboli ad destruendas miserorum animas ad infernum.*

General.

1. **A** Party interested may not be a witness. *Co. Lit. 6. b. 7. a.*

Particular cases.

2. In an information upon the statute of *Usury*, the party to the usurious contract shall not be admitted a witness against the usury; for, in effect, he should be *testis in propria causa*, and should avoid his own bond, &c. and assurance, and discharge himself; and though he commonly raises up an informer to exhibit the information, yet, *in rei veritate*, he is the party, &c. *Co. Lit. 6. b.*

3. A wife cannot be produced either for or against her husband, *quia sunt duae animae in una carne.* *Co. Lit. 6. b.*

4. See rule, *None may be judge in his own cause.*

224. *Jus accrescendi inter mercatores locum non habet.*

1. **W**HERE there are two joint-merchants, the wares, merchandizes, debts or duties that they have as such, shall not survive, but go to the executors of the deceased; and this *per legem mercatoriam*, which is part of the law of the realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* *Co. Lit. 182. a.*

2. See *Comb. 474.*

3. See also rule; *Jointenancy odious.*

225. *Justice to be preferred to charity.*

General.

1. **S**umma charitas est facere justitiam, &c. *11 Co. 70. b.*
2. Justice is preferable to charity. *1 Chan. Ca. 137.*

Particular cases.

3. And therefore debts are to be paid before legacies. *1 Chan. Ca. 137.*

4. A copyholder surrenders to the use of a grammar school, the lord is compellable to admit the tenant, because it is not prejudicial to him, as he has but one tenant, after whose death, his fine is due as it was before, and the use of the land is only to the corporation; *aliter*, had the surrender been to the corporation; for then the lord would have been hurt in his services; the same if the custom of the manor be to devise to one only, and to have an heriot after his death, the tenant may not surrender to two, though to a charitable use, because the lord is delayed of his heriot. *Du. Ch. Uses 140, 142.*

5. The plaintiff's bill was to have satisfaction of a debt owing to him from *Anthony Dean* deceased, who by his will had devised all his lands to the defendant *P.* and to the heirs of his body; with remainder over to others: and in another part of his will, reciting that he owed the plaintiff *P.* money on account, he therefore devised to him all his personal estate, and made him executor, willing him to pay his debts. Upon reading of the will, though the clause for payment of debts seemed to relate to the personal estate only, and though the lands were devised to the defendant in tail with remainders over, and it was objected that the tenant in tail could not be a trustee; yet the court decreed both real and personal estate to be sold for payment of the testator's debts. 1 *Vern.* 411. Note; *This decree was affirmed in parliament on appeal.*

6. Vide 1 *Chan. Ca.* 135, &c. 1 *Vern.* 260. 2 *Ju. Eccl.*

226. King can do no wrong.

1. IF lands before the statute *De donis* had been given to the king, and to the heirs of his body, he could not before issue had have aliened in fee, but only to have barred his issue, as a common person might, and not to have barred the reversion, for that should have been a wrong, in case of a subject, and the king's prerogative cannot alter his case, nor make his estate greater than the donor gave him; and it is a maxim in law, that the king can do no wrong. *Co. Lit.* 19. b.

2. The reason why the king shall not be exempt by the construction of law out of the general words of acts made for religion and charity, and to suppress wrong, is, because he is the fountain of all justice and common right; and being the lieutenant of God, he can do no wrong. *Solum rex hoc non potest facere, quod non potest injuste agere*; and with this agrees *Alton Wood's case*, 1 *Co.* 44, &c. *Lord Berkley's case*, in *Plow.* &c. 11 *Co.* *Magdalen College's case*, 5 *Co.* 14. a. b. *Anne Needler and The Bishop of Winchester's case*, in *Hob.* 220.

3. See rule, *It is the office of temporal judges to advance laws made for religion, &c.*

Rex est { *Persona mixta cum sacerdote.*
 { *Monarcha, &c.*

Rex { *Non potest fallere nec falli,*
 { *quod injustum facere non potest.*

227. King can neither grant, take or command, but by matter of record.

1. THE king's excellency is so high in the law, that no freehold may be given to him, or derived from him, but by matter of record. *Doct. & Stud. lib.* 1. cap. 8.

2. The king's grants are not good but by letters patent and special words of grant; and nothing of inheritances passeth from him without the word *Heirs*; and if he be deceived, his grant is void. But of titles by writ to parlia-

parliament *aliter* ; see case * *The Duke of Arbol* and *The Earl of Derby*, before the house of lords 1737.

3 Vide 1 *Vern.* 277.

228. King, head of the law, and fountain of justice.

1. **T**HE king is *stabilimentum justitiae*. Hob. 154.

2. The king is the fountain of justice and common right, and God's vicegerent, and, as such, can do no wrong, as in *Alton Wood's* case, *supra*. Stat. *de donis*, Stat. *de Monasteriis*, *Collegiis*, &c. and *Anne Needler's* case in Hob. &c. see also *Plow. Com. Grendon's* case.

3. Vide rules, *King may not be supposed ignorant of law. Dispensatio est mali prohibiti*, &c. ca. 45.

229. King is always of full age.

1. **S**EE Stat. 7 E. 6. cap. 3.

2. See rule, *Rex est monarcha & imperator in regno suo*.

230. King may not be supposed ignorant of the law.

THE king may not be taken to be ignorant of the law ; because he is head of the law : and therefore when he, in the particular case, granted the advowson to the dean and chapter, and the grant is *ex certa scientia*, &c. (though the dean and chapter had no licence to purchase in *Mortmain*) yet it is to be understood, the king would have them to have it, notwithstanding the statute of *Mortmain* ; and therefore by the words, *ex certa scientia*, it is to be presumed he took cognizance ; and so the grant itself countervails a grant, and clause of *non obstante*, &c. *Plow.* 502. a. b. And yet my lord *Coke*, with great bravery and a true spirit of liberty, told king *James*, on *Bancroft's* idle complaint against prohibitions, &c. that his majesty could not in his own person adjudge in any case, either criminal, or betwixt party and party, concerning inheritance, chattels or goods, &c. but that the same ought to be determined in some court of justice, according to the laws and customs of the realm ; and that it is the court that gives the judgment ; and that though the king sat in parliament with his lords, and was supreme judge over all, yet the reversals, &c. there were by the king, *with the assent of the lords* ; and so though his majesty might sit in the star-chamber also, yet this was to consult with the justices upon such questions as should be proposed to them, and not *in judicio* ; and that tho' his majesty might also sit in his bench, yet it's the court that gives the judgment, that being always *per curiam* ; and that the judges are sworn to execute justice according to law ; and therefore his majesty could not take any cause out of any of his courts, and pronounce judgment himself upon it ; and that no king since the conquest had assumed these matters to himself, but that they were solely determined by the courts of justice. And further, that though God had endowed his majesty with excellent science, and great endowments of nature, yet his majesty was not learned in the laws of his realm of *England* ; and causes which concerned the lives, inheritances, goods or fortunes of his subjects, were not to be decided by natural reason,

but

but by the artificial reason and judgment of the law, which required great study and experience to attain, and was the measure of the subjects right, and the protection of his majesty in safety and peace; and that though his majesty *non debet esse sub homine*, yet he was *sub deo et lege*. And my lord Hobart saith, that the same reason that supplies the king's ignorance of matters in fact, will also excuse his want of knowledge even of the laws in the subtilties of it; for he studies a greater art, *scil. arcanum regni*, the art of government, which is *ars artium*, and contains all arts, as the commonwealth includes all private societies.

*Tu regere imperio populos Romane memento,
Hæc tibi erunt artes, pacisque imponere morem.*

Hob. 224.

231. King not bound by acts of parliament, unless expressly named.

SEE rule, *Rex est mixta persona cum sacerdote*.

232. King, the power of him and his court is not to be disputed.

SEE rule, *Admiralty not to hold plea of matters cognizable at law, throughout, and particularly Bourn's case*.

233. Lands are holden mediately or immediately of the crown.

1. ALL lands and tenements in *England*, in the hands of subjects, are holden mediately or immediately of the king; for in the law of *England*, we have not properly *allodium*, that is, any subjects lands that are not holden; unless you will take *allodium* for *ex solido*, as it is often taken in domes-day book; and tenants in fee are there called *alodarii* or *aloarii*, and he is called a tenant, because he holdeth of some superior lord, by some service; therefore the king, in this sense, cannot be said to be a tenant, because he hath no superior but God Almighty; the possessions of the king are called *sacra patrimonia*, and *dominica coronae regis*; but though a subject hath not properly *directum*, yet he hath *utile dominium*. Co. Lit. 1. a. b.

2. All advowsons are held mediately or immediately of the crown, and therefore it is that regularly the king must assent to every appropriation; for he might be hurt by this marriage, *as the books call it*; for if the advowson is held of him immediately, then he hath a possibility to have some advantage of the tenure, by wardship, relief or the like, which is taken away by this conjunction; for it is never to be expected the patronage should return to layhands, &c. and if it be held immediately of a subject, yet it is held mediately

ately of the crown ; for all the lands in the realm are held immediately or mediately of the crown ; and necessarily the lands wherein the church, &c. stands, were held of the crown, and the patronage by possibility might escheat, or otherwise might come to the crown ; and if not, yet the crown might have benefit by the lapse, *et nullum tempus occurrit regi*, and every advantage which the king might otherwise have had is lost by the appropriation. *Plow. Com.* 498. *a.* 499. *a.* 500. *a.*

3. Concerning the tenure of lands it is to be understood, that all lands are holden of the crown, either mediately or immediately, and that the escheat appertaineth to the immediate lord and not to the mediate ; and the reason why all lands are holden of the crown, either immediately or by mesne lords, is this, that the conqueror having gotten all the lands of the realm into his own hands in demesne, taking from every man all estate, tenure, property, and liberty of the same, except religious and church lands, and the lands in *Kent*. As he gave the same again out of his own hands, he still reserved rents, knights and other services, and retributions to him and to his heirs ; and this reservation is that which is called the tenure of lands, in which reservation he had four institutions exceeding politic, and suitable to the state of a conqueror. 1. Marriage. 2. Knight-service. 3. Homage and fealty. 4. *Primer seisin*, to pass other tenures necessary to his estate. *Bac. Use of the Law* 30, &c.

234. *Lands may lineally descend, but not ascend.*

1. ONLY lineal ascension in the right line is prohibited and not collateral. *Co. Lit.* 11. *a.*

2. In prohibiting the lineal ascent, the common law is assisted with the law of the twelve tables. *Numb. cap.* 27. See *Brit. cap.* 119. *Fleta, lib.* 6. *cap.* 1.

3. See rules, *Pater et mater et puer sunt una caro*, and the references there. *Inheritances may lineally descend, but not ascend.*

235. *Lands shall not be inalienable.*

SEE 1 *Pe. Will.* 106.

236. *Law and equity both shall prevail against equity only.*

General.

1. IT is generally true, that the law and equity together shall prevail against equity only ; but then it is with this distinction, that the equity that goes along with the law, is of the same nature and as strong as the other equity. *Gilb.* 15.

Particular cases.

2. A judgment creditor brought a bill against a prior conusee of a statute, who had extended the lands to discover what was due on the statute, and on payment to have it set aside. The defendant pleaded that after he had extended the land, he came to an account with the cognizor, who, in

consideration of what was due to the plaintiff, made an absolute conveyance of part of the land, and that he was a purchaser without notice, for a valuable consideration. Plea allowed. 1 *Chan. Ca.* 36.

3. So where a like bill was by a judgment creditor, to discover lands subject, &c. not knowing the place, nor who tenant, &c. 2 *Chan. Ca.* 47.

4. So of a bill to discover bankrupt's estate; defendant may plead being purchaser *sans* notice. 2 *Chan. Ca.* 135, 136. 1 *Vern.* 27. S. C. For the rule is, that a purchaser for valuable consideration shall not be bound to discover to his own hurt. 2 *Chan. Ca.* 73. see 1 *Chan. Ca.* 36. Where a purchaser is not bound to take notice of the other's title or demand, though by matter of record, though he is of a decree bound to take notice. 2 *Chan. Ca.* 48. And the notice must be plainly denied. 1 *Chan. Ca.* 34, 161, 156, 252.

5. If the purchaser buys in an eign incumbrance without notice of the mesne, he shall protect his purchase, with the eign incumbrance bought in. 1 *Vern.* 49. *Salk.* 155, 120, 129, 34, 371. 1 *Chan. Ca.* 36. Though he bought in the eign after he had notice. 2 *Vent.* 339. 3 *Chan. Ca.* 132. 1 *Vern.* 52. 2 *Chan. Ca.* 208. Notice before conveyance executed, good. 1 *Chan. Ca.* 31. *Gilb.* 91. Notice to one who purchaseth for another, good. 1 *Chan. Ca.* 38. *Nels.* 367, 378. Exception on recital, good notice. 1 *Chan. Ca.* 291. Notice to counsel, is notice to the client. 3 *Chan. Ca.* 110. *Gilb.* 8. But though there be a trust in the title, yet if the purchaser purchased *sans* advice of counsel, and knew not of it, he shall be relieved. 3 *Chan. Ca.* 110, 123. But if the counsel did not go through the business, such notice is not good. *Gilb.* 8. Presumed notice, as matters of record. 1 *Chan. Ca.* 37, 144, 231. Payment of rent by tenant, subsequent to the agreement between the lord and dowress, implies notice to the tenant. 1 *Chan. Ca.* 247. The heir is presumed from counter-parts to have notice. 1 *Chan. Ca.* 260. A jointress is presumed to have notice, having covenants against leases, &c. 1 *Chan. Ca.* 260. One need not take notice of such, if not party. 1 *Chan. Ca.* 167. See *Barn.* 82, 221, 236, 359, 367.

6. A voluntary conveyance shall be binding against the party and his heirs, because a volunteer has equal equity with either of them; and having the law shall prevail; but where there is only an agreement, or covenant for such voluntary conveyance, it shall not be executed against the heir who has equal equity with a volunteer. *Max. Eq.* 53. *margin.* See 1 *Vern.* 17, 191, 218. 1 *Chan. Ca.* 243.

7. A purchaser came into a man's study and took and put in his pocket a statute, which would have fallen upon his estate; though he thus unfairly gained the advantage, yet the court would not take it from him. 1 *Vern.* 52.

8. The plaintiff claimed under an old intail, and complained that the defendant had gotten and concealed the settlement and evidences, and prayed a discovery, and to have them delivered up. The defendant pleaded that for 6870*l.* really paid, he was a purchaser, and demanded if he should be bound to discover further, &c. Plea allowed. 1 *Chan. Ca.* 68.

9. If an executor or trustee compound debts or mortgages, and buy them in for less than is due upon them, he shall not take the benefit of it himself, but other creditors and legatees shall have the benefit; and for want of

of them the advantage shall go to the party intitled to the surplus; but if one act for himself, and being not in the circumstances of a trustee or executor buy in a mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due upon the mortgage; for he stands in the place of him who assigned, viz. the mortgagee, who might have given it to him *gratis*; and what is due must be the measure of the court's allowance, and not what he gave; for that might have been more than it is worth, as well as less; and since he runs the hazard, if loss happeneth, he ought to have the benefit in case it turn to advantage. *Salk.* 155.

10. See *Gilb.* 13, 14, 15. *Prec. Chan.* 89, 158, 407, 419, 494, 511. 1 *Chan. Ca.* 97. 2 *Vern.* 691, 698. *Gilb.* 151. 1 *Rep. Chan.* 69, 171. 3 *Rep. Chan.* 62. 1 *Chan. Ca.* 162. 2 *Rep. Chan.* 142. 1 *Chan. Ca.* 201, 119. 2 *Vent.* 338, 343, 377. 1 *Chan. Ca.* 162. *S. C.* 1 *Vern.* 47, 49, 107. 1 *Chan. Ca.* 168. 2 *Chan. Ca.* 98. 1 *Vern.* 41. *S. C.* *Hard.* 318. 1 *Chan. Ca.* 243. 2 *Chan. Ca.* 4. 1 *Vern.* 480. 2 *Chan. Ca.* 133. 1 *Rep. Chan.* 173. 1 *Chan. Ca.* 156. 1 *Vern.* 100, 464, 365. 2 *Rep. Chan.* 265. *Salk.* 416. 1 *Chan. Ca.* 100. 1 *Vern.* 440. 1 *Chan. Ca.* 170, 103. 1 *Rep. Chan.* 275. *S. C.* 1 *Chan. Ca.* 22. 1 *Vern.* 69, 196, 293.

237. Law driveth no man to shew what by intendment he doth not know.

1. **O**NE pleaded he was chosen knight of the shire by a majority, and good without shewing the certain number; for the election might be by voice or hands or otherwise; so that the number could not be easily known. *Fi. Ley* 12. b. 13. a.

2. One is bound in a bond to serve *J. S. in omnibus mandatis ejus licitis*: it is a good plea to say he served him lawfully, without shewing in what service, or on what commandment; for no servant can remember all his services. 10 *H.* 4. 15.

3. One may aver covin generally, without shewing in what manner; for covin is a secret thing contrived privately between two or three, to the prejudice of another. 4 *E.* 6. 46.

4. See 4 *Co.* *Lutterel's case*, 7 *H.* 4. 8.

238. Law favours justice and truth, but abhors falshood, variance, contrariety, folly, negligence, delay, unnecessary circumstances, circuity of actions and matters of vexation, infiniteness and uncertainty.

Favours justice and truth.

1. **E**XECUTIO JURIS NON HABET INJURIAM, the law is good, the abuse thereof is the fault. *Hob.* 266.

2. Statutes to suppress tort, or toll fraud, bind the king, though not named; for justice and truth are the supporters of his diadem. 5 *Co.* 14.

3. The king may not determine the office of a sheriff or any part of it, without making a new sheriff for the execution and administration of justice. 4 Co. 33.

4. Entries of feigned actions in London, were utterly condemned by the whole court; for that by colour of law and justice, they by such means acted against both, and made law and justice the author and cause of tort and injustice. 4 Co. Countess of Rutland's case.

5. If one grants a rent-charge to another out of his lands, the grantee hath two remedies, by way of distress, or writ of annuity; for the grantor having granted it, he hath charged his person; and having granted it out of his lands, he hath charged his lands also; and having thus granted two remedies, it must be in the election of the grantee, who is to have the advantage of these remedies, which he will have. Gilb. 250.

Abhors falsehood.

6. If a man brings debt for two payments at two days, whereof one is not yet come, and that appears of the plaintiff's own shewing, he thereby abated his own writ. 9 H. 7. 3.

7. Upon a reversion granted to two men, or of two acres, or for forty years, or for life; with remainder over, and the tenant attorn to one, or for one acre, or for part of a year, or to the grantee for life only; yet such attornment is good for all; but if the tenant had notice of the true grant, then the attornment is void for all; for that the law abhors falsehood. 2 Co. 68.

8. See rule, *Constructio legis non facit injuriam*.

Variance.

9. If the writ vary from the bond, or other specialty, in name, surname, or the like, in debt or annuity; or the count vary from the writ, as in debt for 20*l*. and declare only for 10*l*. both shall abate. 11 E. 4. 2. 8 E. 4. 2.

10. See 4 Aff. pl. 2. 7 H. 6. 22. 32 H. 6. 3. Fi. Law English 50, &c.

Contrariety.

11. A bond is made *solvendum nunquam*, this *solvendum* is void, and the bond instantly due. 21 E. 3. 46.

12. A lease of a manor, except the services, the exception is void; for it is parcel of the thing demised. Dy. 97.

13. See 4 E. 4. 29. 21 H. 7. 11. b. 2 & 3 Ph. & Ma. 153.

Folly.

14. Waste did not lie at common law against lessee for life or years, because it was the lessor's folly to make such a lease and not restrain his lessee by covenant, condition or otherwise, that he should not do waste. 5 Co. 13. b. 4 Co. 16. b.

15. Baron and feme, in right of the wife, have title and right to enter into tenements which another hath in fee or in tail, and such tenant dieth seised, in such case, after the death of the husband, the wife may enter upon the issue in by descent; for that the descent is avoided during the co-

verture; but where such title is given to a feme sole, and she takes husband, who suffers a descent, she may not enter, for it was her folly to take such an husband, as would not enter in time, &c. *Lit.* 95.

16. See 4 Co. 62. *b.*

Negligence.

17. A recovery in a writ of right bars all, though their right be never so good, who put not in their claim in a year and a day; for *vigilantibus et non dormientibus jura subveniunt.* 5 E. 3. 222. See *Hob.* 347. Where this rule goes not to the king.

Delay.

18. He who pleadeth a record in delay (as to prove the plaintiff excommunicated) must have it ready to shew; otherwise it is if he plead it in bar. 3 H. 6. 15. *b.*

19. In dilatory pleas both defendants ought to join. 12 H. 7. 3.

20. A plea in bar which goes in delay, must be good to every common intent. 8 H. 7. 9.

Unnecessary circumstances.

21. One who is in court ready to join the defendant, may do it *sans* process, as vouchee, the plaintiff's lessor being prayed in aid, when the defendant in replevin avoweth upon him, or the mesne when the lord Paramount avoweth against him, but joinder in aid cannot be by attorney *sans* process. 2 H. 6. 1. *b.*

22. Covenant is with the lessee to make a new lease on surrender of the present one, and after the lessor makes a lease for a further term to a stranger, here the covenant is broken, though the lessee hath not surrendered, which according to the words was to be first done, for that it would be to no purpose as the other hath disabled himself, either to take the surrender or make a new lease. 5 Co. 21.

23. Vide 4 E. 3. 170. 1 H. 6. 4. *b.*

24. See also rule, *Conditions precedent must be literally performed, not so of subsequent conditions, where the court can make compensation.*

Circuity of actions.

25. See rules, *Equity to prevent multiplicity of suits.* *Boni judicis est lites dirimere, &c.*

26. See also *Mansel's case*, 6 Co. 31. 22 H. 6. 46. *Salk.* 550. 2 *Inst.* 491. 1 *Kent.* 3, 120, 265. *Lit. lib.* 2. cap. *Frankalmoigne* 30. *b.*

27 H. 8. 27. *a.* 5 Co. 72, 73. *Sid.* 34, 35. *Cro. Jac.* 368. 2 *Ro.*

108. *Mo.* 842. 5 Co. 17, 18. *Co. Lit.* 385. *a.*

Infiniteness.

27. An act explanatory (as 32 H. 8. cap. 36. which explains 4 H. 7. cap. 24. of fines) shall not be construed against the letter; for at that rate there would want a new act to make an explanation of such exposition, and so *in infinitum.* 3 Co. 31, and 87.

Uncertainty

Uncertainty.

28. Uncertainty is the mother of contention and confusion. *Co. Lit. 9. a. Vue le liver.*

29. See also the rule, *Id certum est quod, &c.*

239. Law favoureth life, liberty and dower.

General.

1. *IN favorem libertatis*, it is commonly said, that three things are favoured in law, life, liberty and dower. *Co. Lit. 124. b.*

Life.

2. *Vide rules, Actus non facit reum nisi mens sit rea. Equity regards substance not ceremony.*

Liberty.

3. *Impius et crudelis judicandus est, qui libertati non favet. Angliae jura in omni casu libertati dant favorem.* Fort. cap. 42. *Vide post. Liberty the greatest jewel.*

Dower.

4. *Vide ante, Dower favoured.*

240. Law favours the public quiet.

1. *SO* common recoveries are favoured, as they are become common assurances. 3 *Co. 3, 6.* 2 *Co. 74.*

2. Whether a recovery be a bar to an estate tail, or not, may not be disputed; because a great part of the inheritances of the realm depend upon it. *Mansel's case*, see 1 *Co. 154, 175. Et jura naturae sunt immutabilia.*

241. Law is the perfection of reason.

1. *AS* lord Coke courageously and wisely answered to king James the first, causes which concerned the life, inheritance, goods and fortunes of his subjects, are not decided by natural reason, but by the artificial reason and judgment of law, which requires long study and experience before a man can obtain the cognizance of it, and that the law was the golden mete-wand and measure to try the cause of the subjects, and which protected his majesty in safety and peace, &c. see 12 *Co. 59, 60. This his lordship said, as hath been before observed, amongst much more excellent matter well worth reading and observing, in answer to Bancroft's groundless complaint, Michaelmas 5 Ja. on Sunday, 10 November. See The Introduction to Ju. Eccl. fo. 44 to the end.*

2. *Inter cuncta leges, et percunctabere doctos.* *Co. Lit. 232. b.*

3. Law is the inheritance of the people; kings govern by it, and cannot govern without it. *Kitch. 2. b. 4. a.*

4. The

4. The law is the perfection of reason, and so cannot suffer any thing that is inconvenient, but rather a mischief. *Co. Lit.* 97. b.

5. *Quod est ex jure, id est justum; quod ab injuriâ proficitur injustum; quid autem sit jus, et si quo consistat injuria legis est definire.*

242. Law more respecteth a lesser estate by right, than a larger estate by wrong.

1. **T**ENANT in fee makes a lease of lands to B. to have and to hold to B. for term of life, without mentioning for whose life, it shall be for the life of the lessee; for it shall be taken most strongly against the lessor; and an estate for one's own life is higher than for the life of another. But if tenant in tail makes such lease, it shall be taken to be for the life of the lessor; for the law more respecteth a lesser estate by right than a larger estate by wrong; as if tenant for life in remainder disseise the particular tenant for life, now he hath a fee-simple; but if the tenant for life die, now is his wrongful estate in fee, by judgment in law changed to rightful estate for life. *Co. Lit.* 42. a. b.

2. See *Co. Lit.* 19. a. b.

243. Law not to be altered.

By act in pais.

1. **I**F I make my last will and testament irrevocable, which in its own nature is revocable; yet I may revoke it; for neither my act nor my words can alter the law, and make that irrevocable which in its nature is revocable. 8 *Co. Vinyor's case*.

By act of parliament.

2. Sometimes the old maxims of the law are changed by statute. *Doct. & Stud. lib.* 1. cap. 8. *So of the other common laws.*

Rule.

3. *Leges Angliæ sine parlamento mutari non possunt.* 2 *Inst.* 619.

244. Law prefers the public good to a private.

1. **I**F tenant in dower sow the land, and die before the corn is ripe or cut, it belongeth to her executors, and not to him in reversion; otherwise it is of grafs and fruits. *Doct. & Stud. lib.* 1. cap. 20. *The common good requireth the lands should be sown with corn for man's sustenance.*

2. In time of war a man may justify making bulwarks in another man's soil without licence, or raising a house, for the safety of the neighbourhood. *Dy.* 36. b.

3. A sheriff may break open the doors of one's house to take a felon, but not to serve a *capias* for a trespass; for that is a particular case, and not for the common weal. *Fi. Law Eng.* 39.

4. Fishermen may justify bringing their nets to the adjoining land to dry; for such fishery is for the public good. A millstone lifted up to be picked,

picked, &c. cannot be distrained, because it remains parcel of the mill, which is for the commonwealth. 14 H. 8. 25.

5. Things brought into an inn, or into a fair or market to be sold, or cloths in a taylor's shop, or a horse at a smith's to be shod, are not distrainable. 22 E. 4. 49. b.

6. See rule, *Rex est mixta persona cum sacerdote.*

245. Law regards the intent of the parties.

1. **R**ESOLVED that every contract executory imports in it an *assumpsit*; for when one agrees to pay money, or to deliver any thing, he thereby assumes or promises to pay or deliver it; and therefore when one sells any thing to another, and agrees to deliver it at a certain day, and the other in consideration thereof agrees to pay so much money at such a day; in these cases both parties might have debt or case; for the mutual executory agreement of both parties imports reciprocal actions; with which agrees *Plow. Com.* 128. And in some cases it would be inconvenient if debt lay only, and not case; as in *Redmayne and Peck's case*, *Dy.* 133. they agreed together, that for a certain consideration *Redmayne* should deliver to *Peck* 20 quarters of barley yearly during his life, and for not delivering them one year, adjudged the action well lay, otherwise it would be mischievous to *Peck*, who should be drove to his action of debt, which he himself could never have, but his executors or administrators; because debt lieth not in these cases, but after the last day incurred. So if a sum of money be given in marriage to be paid at several days, case lies for non-payment at the first day; but debt not till the last. 4 Co. 94. a. b. See *Cro. Car.* 241.

2. But this intention of the parties must be governed by the rules of law; and therefore where there is *debitum in praesenti, quamvis sit solvendum in futuro*, yet because the right of action is in him, the release of all actions is a discharge of the debt itself; and so may an executor before probate release, and yet he can have no action before; * and some say that the ordinary may release, though he can have no action; but if a man by deed covenant to build a house or make an estate, &c. and before covenant broken, the covenantee releaseth to him all actions, suits and quarrels, this doth not discharge the covenant itself, because at the time of the release *nil fuit debitum*, and there was no cause of action in being; but in that case a release of all covenants is a good discharge of the covenant before it be broken. *Co. Lit.* 292. b.

3. In many cases the intention of the party is void to all intents, if it be not grounded according to law. *Doct. & Stud. lib. 2. cap. 20. Vide antea rule, Condition none may take advantage of, but who is either party or privy to it.*

4. So if one man make a lease to another for life, and after, of his meer motion, confirm it for life, to remain after his death to another and his heirs; in this case, that remainder is void in law and conscience; for by law there can no remainder depend upon an estate, but that the same estate beginnoth at the same time with the remainder, and in this case the estate began before, and the confirmation enlarged not his estate, nor gave him any new estate, &c. *Doct. & Stud. lib. 2. cap. 20.*

5. The

* See 8 Co. 135. And quare if the ordinary may release.

5. The purpose or intention of a man without act, is not punishable by law. 4 Co. 16. b.

6. Lands devised to the heirs of J. S. now living, it was held that the eldest son of J. S. should take, though in strictness of speech he was not heir during the life of his father, but heir apparent only, as in *Burchet* and *Durdant's* case, cited in *Prec. Chan.* 57. So note the difference, where by will, which is favourably taken, and where the intention of the devisor is to be pursued, and where by deed, which is to be taken strictly.

7. See the rule, *Intent without act not punishable.*

8. See also 4 Co. 16. Dy. 113. Cro. Ca. 241. Cro. Ja. 505. Co. Lit. 214. b. 313. a. 217. b. 183, 301. b. 302. a. 307. Lit. sect. 352. Hob. 160.

246. Law rejecteth all fractions or divisions in a day.

1. **O**N the question, From what time a lease shall commence, from the day of the date or the delivery? Three points were resolved. 1. That it shall be from the day of the delivery, and not of the date; for the delivery only makes it of force, and not the words *This indenture* and the like. 2. That whereas the said indenture was delivered at four in the afternoon of 20 June, the lease shall end the 19th; for the law in its computation rejecteth all divisions of a day, for the uncertainty, which is the mother of wrangle. 3. That the day of the delivery of the lease shall be taken inclusive, and be part of the time, where it is limited to commence from the making; but if it were *a die confectiois*, or *a die datus*, there the day of the date is excluded; where the words of the statute 27 H. 8. cap. 16. of enrolments are (within six months of the date of the same writings indented) the six months must be accounted from the date, if dated, and not from the delivery, but if not dated, then from the delivery. The day of the date and from the date are the same; for, in judgment of law, the date includes all the day of the date. 5 Co. 1. a. b.

2. See Co. Lit. 46. b. 2 Cro. 647. 3 Lev. 438.

3. See rules, *All the term but one day in law.* *Dies dominicus non est juridicus.* *Distinguenda sunt tempora.* Every man's deed or covenant to be taken most strongly against himself.

247. Law requireth order and decency, and principally respecteth the substance.

General.

1. **O**RDER is the strength and beauty of society. Ratio est anima legis.

Particular cases.

Order.

2. An abbot, prior, or other man of religion, in doing of homage, shall not say, Sir I become your man, but Sir I do you homage; for he hath professed himself to be only God's man. Lit.

2

3. The

3. The tenant ought to seek the lord to do him homage if he be within England; for this service is personal as well of the lord's side as of the tenant's, for the law requireth order and decency; and therefore *Bracton* saith, *adire debet* (he who is to do homage) *domina suo, ubicunque inventus fuerit in regno, vel alibi, si possit commode adire, &c.* and the same law is for fealty. *Co. Lit.* 104. b. 105. a.

Decency.

4. A feme sole, when she doth homage, shall not say, I become your woman; for it would be wrong she should be any man's woman but her husband's when she shall be married. *Lit.*

5. So a woman shall not be quartered for treason, for the decency of her sex, but only drawn and hanged. *Fi. Ley* 14. b.

6. See *Co. Lit.* 97, 105. 8 H. 6. 23. b. *lib. intrat.* 47 E. 11.

7. See rule, *Negatio destruit negationem, &c.*

248. Law respecteth the excellency of some persons.

AS the king, queen, noblemen, &c. and giveth them singular privileges above others. *Fi. Ley* 7. b. see the same *Eng. fo.* 26.

249. Law respecteth the ties of nature.

1. AFFECTION for the provision of the heirs male which one may beget, brotherly love, &c. are good considerations to raise an use, though long acquaintance and intimacy are not. *Fi. Ley* 7. b.

2. A man may infeoff his son and heir pending a *praecipe quod reddat* against him, and is not in danger *de artic' super Chart. cap.* 11. for a son is bound to assist his father when he is able. 6 E. 3. 274. So one brother may maintain another. 32 H. 6. 2. b.

3. Brothers or cousins may not wage battle in a writ of right. *Fi. Ley* 7. b.

4. A statute, that all such as succour or give meat or drink, or other aid, to such an one who hath committed such or such an offence, knowing of it, shall be accessory to the offence, is not to be extended to a wife who receives or gives meat or drink to her husband, &c. *Fi. Ley* 7. b. *Plow. Com.* 465.

250. Law respecteth time.

In time of peace or war.

1. THE law more countenanceth things done in time of peace than in time of war. *Fi. Ley* 10. a.

2. Disseisin and descent *sur ceo* in time of war, will not toll an entry. *Lit.* 97.

3. Usurpation in time of war doth not put a rightful patron out of possession, &c. 7 E. 3. *Fitzb. Presentment* 2. *Fitzb. Nat. Brev.* 31.

Day or night.

4. Rent payable at a day certain, he hath all the day till night to pay it; but if it be a great sum of money, he ought to take so long before sun set, that the money may be counted; for the other is not bound to tell it in the night. *Fi. Ley* 10. *a.*

5. A man may not distrain in the night for rent in arrear. *11 H. 7. 5.* but he may for damage feasant; for the necessity. *11 H. 7. 5.*

Sunday.

6. See rule, *Dies dominicus non est juridicus.*

251. Law tendereth the weakness and imperfection of men.

1. **A** dying seised of the disseisor is no descent to toll the entry of the disseisee, being all the time within age, covert baron, in prison, or out of the realm. *Lit.* 385, &c.

2. Where a lease is to baron and feme, the survivor shall not be charged for waste during the coverture. *2 H. 4. 3.*

3. An infant tenant in tail, suffered a recovery by his guardian, it shall bind him; because he may have remedy against his guardian by action on the case; *aliter* if by attorney, for that is void; because he hath not any remedy over against him. *Godb.* 161.

252. Law to bind all must be assented to by all.*General.*

1. **T**HE rule 44 *E. 3. 19.* is, that no law shall bind the people but such as is made with their consent. *Da.* 33.

How to assent.

2. And consent may be as well by deed as by word, and that which is expressed *facto* is stronger, and that which is expressed by many and continual acts of the same kind, is custom, and so briefly custom is a reasonable act, iterated, multiplied and continued by the people *de temps d'ont memorie ne court.* *Da.* 33.

*To the canons.**General to, and rules.*

3. Canons do not bind here but as they are received and allowed, but when so allowed, they are as parcel of our laws, as in *Cawdrie's case*, 5 *Ca. Dr. Hussey's case*, 7 *H. 8. Keil. Pal.* 469.

4. No canon ecclesiastical can be made or executed without the royal assent. *Vau.* 229.

5. Ecclesiastical decretals of their own authority bind not here. *Doct. & Stud. lib. 2. cap. 26.*

6. Canons,

6. Canons, though ordained by the king's royal licence, and after affirmed by his royal authority, bind not the laity. 12 Co. 72. 2 Inst. 94, 647. 653, 657. Ro. Abr. 454. Mo. 782. Because the laity are not represented in convocation, and therefore their consents not given, and a man can no more be under the obligation thereof than any other law, without his consent expressed or implied, which is not in regard to the canon law. Salk. 673. 20 H. 6. 13. Bro. Abr. Ordinary. 2 Ro. Abr. 226. 2 Cro. 670. 2 Brow. 38. Cro. Ca. 588. Palm. 379.

7. The clergy are bound by canons *in re ecclesiastica*, because they are parties. 12 Co. 72. But they are not bound thereby in temporal matters. 12 Co. 72. Mo. 755.

8. The canons of 1603, do not bind the laity. 2 Ju. Eccl. 308. *Vue le mesme liver*, fo. 332, 333, 334.

9. Canons bind only ecclesiastical persons, and not the laity; because they are made only by the clergy in convocation, and laymen are not bound, because such canons have not the assent of the commons and the temporal lords. Gilb. 160.

As to particular persons.

1. Chancellors. See 2 Ju. Eccl. 272, &c.
2. Surrogates. *Ibid.* 275, &c.
3. Proctors. *Ibid.* 276, &c.
4. Registers. *Ibid.* 278, &c.
5. Apparitors. *Ibid.* 284, &c.
6. Parish Clerks. *Ibid.* 286, &c.
7. Sextons. *Ibid.* 304, &c.
8. Church-wardens, Sides-men, &c. *Ibid.* 305, &c.
9. School-masters of the established church.

10. The chief question was, Whether a school-master might be prosecuted in the ecclesiastical court, for not bringing his scholars to church, contrary to the 79 canon, *anno* 1603? And it was the opinion of Treby chief justice, and Powel justice, and the court, that the school-master being a layman, was not bound by that canon. 1 Pe. Will. 32.

11. The lord chief justice said, he did not think *Rushworth's* being a clergyman, made the case any ways different from what it would have been if he had been a layman; for he could not think that the canons in 1603, made in convocation and confirmed by the crown, without being confirmed in parliament, *bound even the clergy in any matter but in re ecclesiastica*; for if this were otherwise, as his lordship observed, there would be this consequence, That if a clergyman were head of a college, he might be bound in matters relating to him in that capacity; and so in any other temporal right. 2 Ju. Eccl. 329, 330.

12. No ecclesiastical law or canon can restrain one of the liberty the law gives him to teach school, &c. for the common law or custom of the realm cannot be abrogated but by act of parliament. See 1 Ju. Eccl. 162, &c. And therefore no canon can do it; for they are but of slender force in comparison of an act of parliament; nay even a parson himself exercising the employment of a school-master, (*other than in the school of a cathedral church*) head of a college, minister of an impropriation, donative or

free chapel or other exemption, is clearly discharged of all canonical obedience, as no parties to the passing of those particular laws. 2 *Ju. Eccl.* 317, 318, &c.

10. Dissenting school-masters. *Ibid.* 333, &c.

11. Midwives, &c. *Ibid.* 334, 452.

13. References, *Noy* 123. *Bishop of St. David's case* in *Salk.* and *Farell.* 1 *Pe. Will.* 29, 30, 31. *Cro. Jac.* 532. *Cro. Ca.* 551, 670. *Ro. Ab.* 287. *Hard.* 378. *Carth.* 118. *Salk.* 672. 1 *Ju. Eccl.* 90, 127, 165, 321, 336, 353. 2 *Ju. Eccl.* 272, &c. 321, 322, 323, 329, 333, 364, 366, 334. See also the Introduction to *Ju. Eccl.* fo. 2.

14. See rule, *Consuetudo ex certa causa rationabili usitata privat communem legem*, ca. 1.

253. Law will admit no proof against that which the law presumeth.

1. IF tenant in tail discontinue the tail, and dieth leaving issue, and the uncle of the issue release to the discontinuee with warranty, &c. and dieth without issue, this is a collateral warranty to the issue in tail, because the warranty descendeth upon the issue in tail, who cannot convey himself to the intail by means of his uncle. *Lit. sect.* 709. The reason is, because the law presumeth that the uncle would not unnaturally disinherit his lawful heir of what came to him by other means than the uncle's, but that he would leave him greater advancement. *Nemo praesumitur alienam posteritatem suae praetulisse*; and in this case they will admit no proof against that which the law presumeth. *Co. Lit.* 373. a.

2. And so it is of all other collateral warranties; for no man is presumed to do a thing against nature. *Ibid.*

3. So if rent be behind for 20 years, and the lord make an acquittance, for the last rent due, all the rest is presumed to be paid: and the law shall admit no proof against the presumption. *Co. Lit.* 373. a.

4. So if a man be within the four seas, and his wife hath a child, the law presumeth it the husband's child; against which the law will admit no proof. *Co. Lit.* 373. a.

5. If one innocent be accused of felony, and flieth for the same, though he judicially acquitteth himself of the felony, he shall, notwithstanding his innocence, forfeit all his goods and chattels, debts and duties, for his flight, for as to the forfeiture the law will admit no proof against the presumption in law grounded upon his flight; and so in many other cases; yet the rule is, *quod stabitur praesumptio donec probetur in contrarium*, but it hath many exceptions. *Co. Lit.* 373. a. b. See much of this learning through the whole chapter of Warranty, &c. what the law was in lord Coke's time.

6. See 28 E. 3. 14. 29 E. 3. 36. 11 H. 4. 55. 37 H. 6. 19. Dy. 271. 3 Co. 65. b. Mo. 88, 426, 643. An. 14. Ro. Abr. 95. 3 Leon. 258. 1 Keb. 95, 113. 2 Keb. 346. Comb. 59.

254. Law will not drive a man to allow what he is endeavouring to defeat.

IN an *Affise* for the mastership of a chapel against J. S. the plaintiff need not name J. S. master, because he is to disprove J. S.'s interest.
10 H. 7. 9.

255. Law will rather endure a particular mischief than a general inconvenience.

General.

1. THE general grounds of the law of England heed more what is good for many, than what is good for one single person only.
Doct. & Stud. lib. 1. cap. 12, 18.

2. *Nilil quod est inconveniens est licitum*, and the law, that is the perfection of reason, cannot suffer any thing inconvenient. It is better, saith the law, to suffer a mischief that is particular to one, than an inconvenience that may prejudice many. *Co. Lit. 97. a. b.*

3. Every custom that may be hurtful to the interest of a private person, is not therefore void. *Da. 32.* For if it be for the general good, it is still to be observed; as the law prefers a general good to a private interest.

4. There are presumptions of law so violent, as though they be false, a man shall not be allowed to aver against them.

Particular cases.

5. As in a *praecipe* the tenant pleaded himself villain to J. S. and that he hath nothing but his villainage; the demandant had no reply, though it was false, but his writ must needs abate till, statute 37 E. 3. admitted the counter plea. *Mansel's case* and 16 H. 7. So in replevin, if upon avowry the tenant disclaims he shall have judgment though it be false; for the law believes that these parties will not do themselves wrong in so high a degree.
Hob. 297.

6. Also the law presumeth violently, that a layman cannot be absolutely discharged of tithes; and therefore will not allow a prescription of such discharge, holding it more reasonable that some one man should suffer a mischief to lose such a privilege, being so improbable and of so dangerous consequence, than, for his particular, to admit a spoil of the church, and decay of religion; according to the rule *Omne magnum exemplum aliquid habet ex iniquo, quod publica utilitate compensatur*, and though you shall be allowed your discharge by grant, when it appeareth; yet when it appears not, *stabitur praesumptio.* *Hob. 297.*

7. See *Doct. & Stud. lib. 2. cap. 50, 51.* *Hob. 224.* 4 Co. 124. *Wiseman's Civil Law* 46. *Co. Lit. 552. b.*

8. See also rules, *Actus non facit reum nisi mens sit rea*, ca. 9. Law will admit no proof against that which the law presumeth. *Aequitas sequitur legem.* *Res inter alios acta, &c.*

256. *Law will rather suffer things against the principles of Law, than that a man shall be without a remedy.*

1. **O**N process to avoid an outlawry one shall not be disabled by any other outlawry. 7 H. 4. 40.

2. If the lord distrain tortiously, and the beasts return to the tenant, yet he may have his replevin; for that he could not have trespass against his lord. 33 E. 3. Fitzb. Replevin 44. Fitzb. Nat. Brev. 69. b.

3. One after judgment gone against him for the king, may plead a charter of pardon, or the like done mesne between the verdict and the judgment; and that because he cannot have an *audita querela*, otherwise of a common person. 11 H. 7. 10.

257. *Law will not suffer wrong.*

General.

1. **T**HE law was provided not to engender, but prevent suits; and therefore provides that things be done by indifferent means and persons; that there be no suspicion of indifferent dealing. Hob. 107. *Vue tout le case.*

Particular cases.

2. *Quod est jure, id est justum, quod ab injuria proficitur injustum; quid autem sit jus, et in quo consistat injuria, legis est definire.*

3. Every man is bound to make recompence for such hurt as his beasts shall do in the corn or grass, &c. of his neighbour, though he knew not of it. Doct. & Stud. lib. 1. cap. 9.

4. Men outlawed or excommunicated may bring actions as executors; so a villain shall against his lord, for they are to recover *en auter droit*. 21 H. 6. 30. b.

5. If an alienation be made in *Mortmain*, or a fine levied of a reversion of lands held *in capite sans licence*, the tenant is not compellable to attorn. 17 E. 3. 7. 45 E. 3. 6. See *Two last rules*.

258. *Legacies to be paid out of the personal estate.*

General.

1. **T**Hough the real estate be charged with the payment of legacies, as being either devised or conveyed to trustees for payment of legacies, yet the personal estate shall be first applied, as in case of debts, 1 Chan. Ca. 297. But where in a particular devise or other express provision, *aliter*. Prec. Chan. 451. 2 Vern. 718.

Particular cases.

2. The testator seised in fee entered into a statute, and devised a legacy of 500*l.* the cognizee took all the personal estate in execution; so that there was nothing left to pay the legacy; equity decreed the real estate to stand charged with the legacy. 2 Chan. Ca. 4. And yet the land was not charged

charged with the legacy originally ; but as there was sufficient of the personal estate to pay the legacy, had it been so applied, instead of being applied to satisfy the statute, in case of the heir's lands ; so far as the real estate is eased by this application of the personal estate, the real estate shall be liable to the legacy. 2 Chan. Ca. 117.

3. *N.* seized in fee, and indebted by bonds, by his will gives legacies to his children, (for whom he had otherwise provided before) and devises his lands to his eldest son in tail, whom he also made executor: now the legatees brought bill to come against the real estate, in the place of the bond creditors, and to be paid out of the lands, as the bond creditors would: and the court seemed to admit, if the lands had descended, the legatees might have been relieved in this manner, but since the testator had devised them, it was resolved they ought to be exempted; for it was as much the testator's intention, that the devisee should have this land, as the others the legacies; and a specific legacy is never broke into in order to make good a pecuniary one: also this case is out of the statute against fraudulent devises; because the debts are paid, and the children being otherwise provided for, are not in the nature of creditors. *Nota*; This case was upon an appeal from a decree of the master of the rolls, who held the real estate should be so charged, that both the debts and legacies should be paid. *Hern versus Merick*, Salk. 416.

4. *A.* bequeaths a legacy and makes baron and feme executors, and dies, and the baron makes his will, and the feme and his son executors, and dies. A legatee of *A.* exhibits a bill against the feme and her son, and chargeth that the estate of *A.* liable to the legacy, is come all to the hands of the feme and her son. The son demurred, for that the feme was the surviving executor of *A.* and only liable, and the son being executor of one of *A.*'s executors, who died first, leaving an executor of *A.* to survive, was not privy in law, nor accountable for the estate of *A.* which though it be so in point of law, yet inasmuch as it was charged that the son had gotten the estate of *A.* the demurrer was over-ruled: the court resolving that the estate of *A.* in whosoever hands, ought to be liable to his legacies. 1 Ch. Ca. 57.

5. See 1 Rep. Chan. 134, 288. 2 Rep. Chan. 2. 1 Chan. Ca. 257, 258.

6. See also rule, *Personal estate to go in case of the real.*

259. *Legal reason est summa ratio.*

1. **T**HE law is the perfection of reason. Co. Lit. 97.

2. Law is the fountain of justice and common right. 11 Co. 72.

3. As the law is the perfection of reason, so reason is the life of the law; nay the common law itself is nothing but reason, which is to be understood of an artificial perfection of reason gotten by long study, observation and experience, and not of every man's natural reason; for *nemo nascitur artifex*. This *Legal reason est summa ratio*; and therefore if all the reason that is dispersed into so many several heads were united into one, yet could he not make such a law, as the law of *England*; because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this realm, as the old rule may be justly verified

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of it. *Neminem oportet esse sapientiores legibus*, which is the perfection of reason. Co. Lit. 97. b. See 11 Co. 10. b.

260. *Leges Angliae sine parlamento mutari non possunt.*

General.

1. **W**HAT the law doth warrant in case of prohibitions, to keep every jurisdiction within its true bounds and limits, cannot be altered but by act of parliament. *Quia leges Angliae sine parlamento mutari non possunt.* 2 Inst. 619.

Particular cases.

2. When the clergy were most importunate to have the canon to make infants legitimate, which were born before espousals, marriage following; as the church looked upon such as lawful issue; it was rejected in the parliament of Merton; *omnes comites et barones una voce responderunt, nolumus leges Angliae mutari, quae hucusque usitatae sunt.* Kelw. 7 H. 8. 181. b. Da. 70. b. 1 Ju. Eccl. 63.

3. See 2 Inst. 602. 1 Ju. Eccl. The opposition which ecclesiastical usurpations have met with.

4. Vide etiam ante *Law not to be altered.*

261. *Leges posteriores priores contrarias abrogant.*

General.

1. **T**HIS rule must be understood only to extend to such prior laws, as are by these subsequent laws intended to be abrogated or taken away, or where the former law is repugnant to the new one; for it was resolved that the statute 23 H. 8. cap. 10. did not extend to take away the good and charitable uses in the case at bar, namely, *The maintaining a grammar school and poor people, &c.* 1 Co. 25. b. *vue tout le case.*

Particular cases.

2. Allen Clerk devised certain lands in London to the master, fellows and scholars of Trinity College Cambridge, and their successors for ever, for finding certain grammar schools for poor scholars: and on question, Whether this was a good devise, notwithstanding the statute of lands *ad manum mortuam non ponend'*, or any other law, act or statute? It was held good by the statute 1 & 2 Ph. & Ma. and that the said statute Ph. & Ma. ought to be favourably expounded. Dy. 255.

3. It was moved in arrest of judgment, that an information lieth not against baron and feme, for the recusancy of the wife, to recover 20*l.* a month; for the statute 7 Jac. cap. 6. appoints that if a feme covert be convict, she shall be committed to prison; and if the husband redeem her out of prison, he shall pay 10*l.* per mensem; so that the statute, being *lex posterior*, abrogateth the former law, that the husband shall not be charged with the recusancy of the wife, but only at 10*l.* the month; and not with that neither but to redeem her out of prison. *Sed non allocatur*; for this statute doth not alter any of the former laws, but prescribes that a feme covert

vert recusant being convicted, if she, after three months, do not conform herself, she shall be committed to prison, unless the husband will pay 10*l.* for every month she shall be out of prison and not conformed. *Cro. Jac.* 529.

4. See *Cro. Jac.* 121. 4 *Salk.* 182, 353, 369, 378, 383, 450. 4 *Mod.* 50. *Fitz-G.* 124.

5. See rules, *Leges Angliae sine parlamento mutari non possunt.* Law not to be altered.

262. Length of time no objection to redemption in case of a mortgage.

1. **T**HE bill was to redeem a mortgage. The defendant demurred, for of the plaintiff's own shewing the mortgage was 60 years old; demurrer over-ruled; because it was charged in the bill, that the mortgagor agreed the mortgagee should enter and hold till satisfied; which is in the nature of a *Welsh* mortgage; and in such case length of time is no objection. 1 *Vern.* 418.

2. See 1 *Vern.* 395, 477.

263. The lesser estate merges in the greater.

General and what.

1. **E**STATE in lands are properly said to be merged or confounded, when the lesser estate meets with the greater, in the same person, and in the same right; as *terminus et feodum non possunt constare simul in unâ eademque personâ*, and the pregnant reason of this is put in the case of *Bracebridge*, *Plow. Com.* 319. *b.* because that a term is a time finite, and the finite, of necessity, ought to be merged and confounded in the infinite. *Da. 4. b.* Note the diversity between merger and extinguishment. *Ibid.*

Terms and inheritances.

General to them.

2. The term and inheritance being in the same hand, the term is merged. *Prec. Chan.* 252.

3. A term may merge in the inheritance by both being in the same person. 3 *Chan. Ca.* 15, 31. 2 *Mod. Ca.* 124. *Whitchurch* and *Whitchurch*.

Particular cases.

4. A lease is to *A.* and his assigns, *habendum* to him during his life and the lives of *B.* and *C.* adjudged this limitation good; for where it was objected, that where one hath two estates in him, the greater shall merge the less, and that an estate for one's own life, is much higher than one for the life of another; and that therefore this estate for his own life and the lives of the other, may not stand together; whereto it was answered and resolved, that the lessee had but one estate which hath this limitation, *scil.* during his life and the lives of two others, and he hath but one freehold; and therefore there can be no merger of estate; but he hath an estate of

of freehold to continue during these three lives, and the longest liver of them. 5 Co. 13. a.

* 5. One intails his estate on an eldest son, chargeable with a fortune to a younger, and in case of the younger's death without issue, such fortune to descend as an estate-tail; both after descend upon the same person, this is not a merger of the fortune, but remains a debt upon the real estate, for the benefit of the creditors. See case *Irwine and Sir Alexander Cumming, Bart.* before the house of lords, 4 May 1733.

Copyhold and inheritance.

6. A copyholder in tail takes a conveyance in fee, the copyhold is merged. 1 Vern. 458.

7. A copyholder in tail, remainder in fee, purchased the freehold from the lord. Lord chancellor declared, That the purchase of the freehold attached the other estate, being but an estate at will, and that the copyhold was merged; and that a purchaser from the copyholder, who so bought in the inheritance, should hold against the issue in tail. 1 Vern. 393.

8. *Ejectione firmæ*. The case was, *Lettice Knowles*, copyholder for life, surrenders in consideration of 20*l.* to the use of *Dorothy Whisler*; the lord accepts of the surrender, and grants to *Dorothy* for life, and she is admitted, and dies; *Lettice* now claims as her former estate, and let to the defendant, and the lord enters and let to the plaintiff; upon this verdict; for the defendant, it was argued that when a copyholder for life surrenders to the use of another who is admitted, the first copyholder hath *quasi* a possibility, or the remainder of an estate; that if he survive him to whose use the surrender is made, that he shall have it again. But agreed that if a copyholder for life surrenders his estate, to the intent that the lord should grant to whomsoever he pleased, then his estate was drowned, but not here; and for that the book 9 *Eliz. Dy.* 264. was cited; but all the court conceived she may not have it again, but that her estate is merely determined by the surrender, and that to that purpose there is no difference, to surrender all her estate to the use of one, and to surrender generally; and the book above warrants no such difference; for if a tenant for life surrender to the use of another, and the lord grant it, he is merely in by the lord, and not by the copyholder who surrendered; but if a copyholder in fee surrender to the use of another for life, who is admitted, he is in *quasi* by the copyholder, and who on his death shall have it again, but not here; whereupon it was adjudged for the plaintiff. *Note*; This judgment was impeached by writ of error, and the matter in law assigned for error, and by all the justices in C. B. and barons of the exchequer, the judgment was affirmed. *Cro. Ca.* 204, 205. See 4 Co. 27. b. 28. b. 29. b. 5 Co. 20. Co. Lit. 41. Plow. Com. 555.

9. Vide 2 Rep. Chan. 174. 2 Leon. 114. Mo. 371. b. 376. b. 2 An. 22, 29, 43. 2 Cro. 56, 57, 202. 1 Ro. 439.

264. *Lex citius tolerare vult privatum damnum, quam publicum malum.*

RULES, *Res inter alios acta, &c.* One not to be prejudiced by the act of a third person. Law will rather endure a particular mischief than a general inconvenience.

265. *Lex necessitatis est lex temporis, scil. instantis.*

AND therefore it is well said, *necessitas legum vincula irridet*, but this is when you may perceive the case brought to extream necessity, &c. the law permits you not to kill him who assails you when you draw near your last refuge, because you foresee you shall be driven to it, but you must forbear till that necessity be at its full period; for till then it may be otherwise prevented or remedied. *Hob. 159.*

266. *Lex nil facit frustra.*

1. **W**HERE I suffer an injury joined with a loss, the law shall give me a remedy and recompence according to my certain and uncertain loss; yea, and sometimes where the thing is not in being but utterly extinguished. *Hob. 43.* And touching the uncertainty if a man grant an advowson with warranty, and the tenant in a writ of right of advowson vouch, he shall have, if he lose, recompence in value of land, or other certain profit, and yet the advowson of itself is utterly of an uncertain value. So of a liberty *bona et catalla felonum, &c.* *Hob. 43.*

2. See *Jenk. 256. Co. Lit. 197. b.*

267. *Lex non cogit ad impossibilia.*

1. **I**T was resolved, that the lessee for years in the case at bar, claiming under letters patent from the queen, ought to shew the letters patent made to the lessee for life; for it is a maxim in the law, that he who is party or privy in estate or interest, or he who justifies in right of him who is party or privy pleading a deed; though he so privy claims but parcel of the original estate, yet he ought to shew the original deed to the court; and the reason why deeds so pleaded shall be shewed to the court is, that to every deed two things are necessary. 1. That it be good in law, and this is called the legal part; because the judgment of it belongeth to the judges of the law; the other concerns matter in fact, viz. if it be sealed and delivered as a deed, and this is triable *per pais*; and therefore every deed ought to prove itself, and to be proved by others; as to the proving itself, it is in two manners, 1st, As to the words, *whether good in law*, which the court is to judge of. 2dly, If it is not rased or interlined in points or places material; and hereof the judges antiently judged on view, &c. 7 E. 3. 57. 25 E. 3. 41. 41 E. 3. 10. &c. But of late the judges have suffered it to be tried by the jury, &c. 3dly, That it might appear to the court and parties, whether it was upon condition, limitation, or with power of revocation, &c. if the deed be poll, or it want a

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counter-part of the indenture, the other party may take advantage of any of these matters. And with this agrees *Lit. cap. Condition, fo. 90, 91. 40 Aff.* 34. And these are the reasons of law, that deeds pleaded in court shall be produced and shewn to the court; by which it appears how dangerous it is; to suffer any, who in pleading ought to shew the deed itself to the court, upon the general issue, to prove it in evidence by witnesses to the jury; or to prove it by copy; for that the viciousness, rasing or interlineation, or other defects in these cases do not appear to the court; or the deed might be upon condition, limitation, or with clause of revocation; and by this means truth and justice, and the true reason of the common law should be subverted; but yet in great and notorious extremities, as by the malancholy accident of fire, wherewith his evidences were burnt, there it appearing to the judges, they may, in favour of him who sustained so great loss by fire, suffer him to prove his deed by witnesses in evidence to the jury; lest calamity should be added to calamity, 28 *Aff. pl. 3.* but in the 12 *Aff. pl. 16.* the judges would not suffer a deed to be given in evidence which was not shewn before to the jury. *Vide 26 Aff. pl. 2.* the like 10 *Co. 92. a. b.*

2. But the copy of a record may be shewn and given in evidence before the jury; for records are of so high a nature, and of so great credit in law, that they can be no otherwise proved than by themselves, and no rasure or interlineation shall be presumed in them; and therefore a copy of a record, being testified to be true, is permitted to be given in evidence; but the sure way is to exemplify it under the great seal, or at least under the seal of the court. 10 *Co. 92. b. 93. a.*

3. And in the case of casualty by fire, there ought to be very great circumspection and discretion in the judges; for notwithstanding such casualty, he in pleading ought to shew the deed itself to the court, else the plea shall be insufficient, and judgment be given against him; for the law will rather suffer a mischief in a private case, than an inconvenience, which would, by breaking a rule of law, be introduced to the public. 10 *Co. 93. a.*

4. And the deed ought not only to prove itself, but to be proved by others, that is to say, by witnesses, that it was sealed and delivered; else though the fabric and composition of the deed be lawful, it is but defective without the other. 10 *Co. 93. &c.*

5. Resolved, if one plead seisin of a copyholder in fee, and claims under him; he ought to shew of whose grant, as he ought to shew of any other particular estate; and though it was said it may be so antient that it may not be shewn who was the first grantee, yet it was held sufficient to shew the admittance of the last heir, which is in the nature of a grant, and may be pleaded by way of grant. *Cro. Jac. 103.*

6. A lessee for years not to alien *sans* licence, obtains a licence to alien part; the lessor grants the reversion; the lessee attorned and then aliened; the grantee enters; the lessee brings trespass; the grantee justifies by reason of the condition; the lessee shews his licence. *Cur'*: The plea is good enough without shewing it; because of its nature it could not be without writing, and there did not any interest pass thereby, but a restraint only set at liberty; and it is a thing executed, and his assignee peradventure hath it, for the fortifying his estate; and though the alienation was after attornment and grant of the reversion, &c. yet it is good enough. *Cro. Jac. 102, 103.*

7. The case was, A feme sole made a lease for life, and the lessee did waste, and the husband released, and delivered the deed to an indifferent hand, to be delivered to the defendant upon certain conditions to be performed; the defendant performs them, the husband gets the release and keeps it from the lessee, and baron and feme bring waste; the lessee on this special matter may plead the release without shewing it. *Vide 10 E. 3. 40.* So if baron and feme are impleaded in an action real, where the default of the wife is the default of both, if the demandant take the feme of the tenant from him, this shall not turn the tenant to a default. So in dower, detinue of charters, &c. by the demandant, is a good plea. *20 H. 7. 5.* So of tenant by statute merchant or staple, &c. he is not to shew the deed; for he came in by process of law against the will of him who hath the deed; and hath not means of coming at it; otherwise of a lease for life or years, &c. for there he came in by the lessor, and might have taken covenant or other security for peaceable enjoyment, &c. *5 Co. 75. a.*

8. Trespass for tithes taken; the defendant justifies as servant, and doth not say *hic in curia prolat'*; and for this cause the plaintiff demurred in law generally; and judgment for the plaintiff; and now error is brought and assigned, for that he being but a servant, the letters patent from the queen do not belong unto him, and therefore his plea was good without shewing of them: but all the justices and barons conceived, in regard he derives his authority from the patentee, and not by act in law, but by his command, he ought to shew the letters patent, as well as he who claims by assignment under the patent; but he who claims under an act in law, for that he had no means to make the patentee shew it, may justify without shewing it. Wherefore judgment was affirmed. *Cro. Jac. 317.*

9. See *5 Co. 76. a. b.* *Cro. Ca. 209, 442.* *Cro. Jac. 137, 669.* *Cro. Eliz. 9, 22, 67, 188, 249, 656, 697.* *Cro. Jac. 515, 645, 652, 716.* *1 Sid. 82, 146, 293.* *1 Vent. 46, 165, 242, 255.* *3 Lev. 104, 137, 238.* *2 Lev. 95.* *1 Mod. 18, 206, 262.* *3 Mod. 147.* *6 Mod. 194.* *Salk. 125, 467, 536.* *2 Lev. 2.* *1 Vern. 45.* *Skin. 113.* *Lutw. 379, 405, 410.* *Saund. 320.* *1 Lev. 44, 93.* *2 Lev. 95.* *3 Lev. 104, 137.* *1 Mod. 104, 264, 265.* *2 Mod. 201.* *3 Mod. 191.* *3 Keb. 273.* *Raym. 282.* *1 Vent. 257.* *Ca. Lit. 197. b. 231. b.* *Hob. 96.*

10. See rules, *Lex spectat naturae ordinem.* *All the term in law but one day, ca. 6.*

268. *Lex plus laudatur quando ratione probatur.*

LES arguments et les raisons del' ley, &c. *ratio est anima legis*; for then are we said to know the law, when we apprehend the reason of the law, that is, when we bring the reason of the law to our own reason, that we perfectly understand it as our own; and then, and never before, we have such an excellent and inseparable property and ownership therein as we can neither lose it, nor any man take it from us, and will direct us (the learning of the law is so chained together) in many other cases; but if by your study and industry you make not the reason of the law your own, it is not possible for you long to retain it in your memory; and well doth our author couple argument and reason together, *quia argumenta ignota et obscura ad lucem*

lucem rationis proferunt et reddunt splendida; and therefore *argumentari et ratiocinari* are many times taken for one, &c. *Co. Lit.* 394. b. 395. a.

269. *Lex spectat naturae ordinem.*

1. **I**F the tenant hold of his lord by a rose, or by a bushel of roses, payable at the feast of St. *John* the baptist, if the tenant dieth in winter, the lord cannot distrain for his relief until the time that roses by the course of the year may have their growth, &c. and so of the like. *Lit. sect.* 129. *Lex spectat naturae ordinem. Lex non cogit ad impossibilia.* The argument *ab impossibili* is forcible in law, *impossibile est quod naturae rei repugnat.* And *Littleton* puts a difference between corn and roses; for corn will last; and therefore the tenant must deliver it presently before the time of growth; and so of saffron and the like; but roses or other flowers that are *fructus fugaces*, cannot be kept, and therefore are not to be delivered till the time of growing; neither is the tenant driven by law, artificially to preserve roses; for the law, in these cases, respecteth nature and the course of the year, *et ars naturam imitatur.* *Co. Lit.* 92. a.

2. See *Co. Lit.* 197. b.

3. See also rule, *Lex non cogit ad impossibilia.*

270. *Liberty the greatest jewel.*

General.

1. **T**HE common law holdeth the body the greatest pain and highest coercion; for as our blessed Saviour saith, the body is of more worth than raiment, &c. and in *Job*, *pellis pro pelle*, all a man hath he will give for his life, but touch his flesh or his bones, &c. and imprisonment toucheth both. *In salva et arcta custodia.* *Hob.* 61.

Particular cases.

2. Of all executions, that of the body in law is esteemed the best, as also in the law of nature it is the best, and most forcible, and therefore 7 *H.* 6. 6. by the opinion of *Cotismore*, if two executors have judgment, and one prays a *capias*, and the other *fi. fa.* the *capias* shall be awarded as best for the testator; and the common law gave not that execution, as being too hard and heavy, but only in the case of wilful wrong, *vi et armis*, for which none was thought too hard, &c. *Hob.* 61.

3. And therefore barons were not subject to it, but on great contempts, nor yet since the statute 25 *E.* 3. though not specially exempted. *Hob.* 61.

4. Though in trespass *vi et armis*, at common law, against a baron a *capias* lieth not, nor after by the equity of the common law upon the statute, because the estate of a baron is intended sufficient; yet 11 *H.* 4. 15. *in homine replegiando*, against lady *Spencer*, a peeress of the realm, viz. a baroness born, it was granted; because it was an high injury to the person whom she eloined. *Hob.* 61.

5. See rules, *Ignorantia facti excusat. Executio juris non habet injuriam.*

271. *Licet consuetudo sit magnae auctoritatis, nunquam tamen praejudicat manifestae veritati.*

1. **T**HE plaintiff brings an action in *London*, for that the defendant called the plaintiff's wife a whore, and the defendant removed it by *habeas corpus* in *B. R.* and it was moved for a *procedendo* to remand it; for that the action was maintainable in *London* for these words, but not at common law; but the motion was denied *per totam curiam*; for such custom to maintain actions for such brabbling words is against law, *licet consuetudo sit magnae auctoritatis, &c.* 4 Co. 18. a.

2. A prohibition was moved for to stay proceedings in the consistory court of *London*; for that it appeared on the face of the libel, they had no jurisdiction; this being a libel which chargeth the defendant with calling the plaintiff's wife whore in *London*, but as it was after sentence, *Fortescue*, justice, said, a prohibition did not lie upon the face of the libel, without affidavit of the custom that an action lies there; for as the judge said, we are not obliged to take notice of their customs; and said he remembered two or three cases to this purpose. Prohibition denied, because moved the last day of term. 2 Ju. Eccl. 218.

3. This was upon a rule to shew cause why a prohibition should not be granted to the consistory court of the bishop of *London*. Mr. *Strange* said that the foundation on which the rule was obtained, was, that it was for calling a woman whore, and that the words appeared in the libel to be spoken in *London*; but he submitted it, the words did not appear to be spoken there; for they are laid to be spoken in the parish of *St. Giles Crippllegate, London, or in some other place in the neighbourhood thereof, or near thereto adjoining*; and in such case, where there is not sufficient certainty appearing on the libel, usually the party makes affidavit that the words were spoken in *London* and not elsewhere; and he further observed the charge was only for saying the other had a bastard, without directly calling her whore; and in these cases the court expects the word *whore* should be particularly expressed. Lord chief justice thought there was sufficient ground to believe the words were spoken in *London*; and that he thought them sufficient of themselves, &c. Rule made absolute for so much of the words as were spoken in *London*. 2 Ju. Eccl. 218, 219.

4. See 6 Co. 6. a. b. 1 Vent. 343. Pal. 379. Salk. 547, 548. 2 Ro. Abr. 296. Lutw. 1039, 1042.

272. *Limitations, in restraint of marriage, over to another, makes them good; else such restraints are only in terror.*

General to, and rules.

1. **A**S to the question, Where *in terrorem* and where not? Where to work a forfeiture, there should be a devise over, else it is to be taken only *in terrorem*; otherwise strangers executors might run away with great part of a man's estate from his children. That the distinction where

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a devise

a devise over, and where not, has been taken in all cases, and was certainly a very good one, and though lawyers know it would be no forfeiture, yet the parties did not; and therefore it would be some terror to them: but these restrictions could hold no longer than the parties come of age, after which they would be intitled to their fortunes, and might bring a bill for recovery; that these clauses in restraint of marriage have never been taken favourably. *Prec. Chan.* 562. *Note*; In this case were cited *Fry and Porter's case*, 1 *Vent.* 300. 1 *Chan. Ca.* 122. Sir *And. Bellasis's case*, 346. *Lloyd and Hughe's case*, and *Lord Salisbury's case*, &c.

Particular cases.

* 2. *Cambel* devised 6000*l.* to his grand-daughter *Catherine Burton*, to be paid on the day of her marriage, with interest from the testator's death, in case she married with the consent of *Samuel Burton*, Esq; her father; but if she married without such consent, or died before marriage, then the testator limited this 6000*l.* to all the children of his the testator's brothers and sisters, to be equally divided amongst them; then the testator died, and the said *Catherine* being then about 19 years old, the father, by friends, moved a match for her with lord *Netterville*; but after, *Burton* weighing his own circumstances, and his inability to make good the proposals by his friends made to lord *Netterville*, entered into schemes to accomplish the match without entering into strict settlement or agreement; and to that end gave the lord and lady frequent opportunities of coming together, and at length finding their affections engaged, went one day out in his chariot on purpose, as was proved in the cause, to give the young couple an opportunity of being privately married, and which accordingly took effect the last day of *February* 1731; after *Burton* taking advantage of the marriage being thus had, and under pretence that the lord and lady had not obtained his consent, prevailed upon his lordship in full form to make a considerable settlement on his lady by her late maiden name, and to be married again with full appearance of his the said *Burton's* consent, as being party to the said settlement, and consenting to the said marriage; but the parties to whom the 6000*l.* was given over, brought their bill, insisting the marriage in *February* 1731, was without *Burton's* consent. But it was decreed by the lord chancellor in *Ireland*, that the lord and lady *Netterville* were well intitled to the said fortune, to be applied as by the articles was agreed. And on appeal the decree was affirmed by the lords here, *April* 1737.

* 3. *I leave and bequeath to my Daughter Anne* 2000*l.* to be paid her on the day of marriage, or at the age of 21 years, which shall first happen; and in case my said daughter *Anne* shall marry with the consent and approbation of *Robert Oliver*, Esq; *Berkley Taylor*, Esq; *John Croker*, Esq; and my said son *John*, or any two of them; I further leave and bequeath to my said daughter *Anne*, the additional sum of 2000*l.* more, otherwise not. *Anne* coming of age, writ to *Oliver* to know what fortune she was intitled unto, who sent her counsel's opinion, that she was intitled to the additional 2000*l.* whether she should marry with or without consent; the same not being given over. After her brother *John*, disliking the match he saw her carrying forward, declared such dislike to her and warned her, that if she proceeded in it, she would forfeit the additional 2000*l.* and on their referring themselves to another counsel, who was a relation of the family, he

he was in opinion with the brother; however, the lady thought proper to proceed in this amour, and so the marriage took place. And on a bill by the husband and wife, the court of exchequer in Ireland decreed it a forfeiture, *Holmes et ux' versus Lysaght*; and 24 May 1733, an appeal was to the lords here, but it ended by compromise. *Had 4000l. been given to her, but on condition if she married without such consent, that then 2000l. of it should be gone and lost to her; in such case, it not being given over, on her having solicited the consent necessary, though she had not obtained it, as I take it, the first opinion had been right; as it was not in such case given over; but the present case is plainly of a condition precedent, to be performed on her part; she was first to marry, and that with such consent, to make her title to the additional 2000 l. and those were the terms on which she was to have it, and not otherwise. Had she never married, this additional sum could never have been raised; and her marrying, but that without consent, was falling principally short of the terms annexed; and that too in the very point armed against, and so makes a total breach of that condition.*

* 4. Admiral Grayden by his last will and testament gave 1000l. to his daughter Mary to be paid at 21 or day of marriage, which should first happen, provided she married with the consent of his executors Mary Grayden the testator's mother, Mary Grayden his wife, and Jeremiah Grayden his brother; and in case she died before such age or marriage as aforesaid, then he gave and bequeathed the said 1000l. to his two younger sons Benjamin and Gregory Grayden; and the surplus of his personal estate he devised in trust for his wife and children, to be divided amongst them as if he had died intestate. All the executors died before the daughter attained her age of 21 or marriage. Mary the mother made her will anno 1733, in the beginning of which she gave her said daughter Mary certain specific legacies, and towards the end thereof she gave the surplus of her personal estate to be distributed among her three younger children, and about the middle of the will was the following clause, *And my will is, that if my daughter marries before her age of 21, without the consent of my executor under his hand and seal first had and obtained, if living, then she shall not be intitled to any part of such legacies as I have given her, and in such case my will is, that the same shall go to my two younger sons Benjamin and Gregory Grayden; and afterwards towards the end of the said will, she made John her eldest son her executor. The same year the testatrix died, and John renounced the executorship, and thereupon administration with the will annexed was granted to Tinwel. Soon after this, Robert the son of Sir Henry Hicks commenced an amour with the said Mary the daughter, who then lived in the house of Tinwel the administrator, who acquainted Sir Henry therewith; and on Sir Henry's disapprobation thereof, Tinwel acquainted Robert the son therewith; notwithstanding which, Robert prosecuted his addresses, and particularly on Tinwel's further application to Robert about the month of July 1736, and desiring him to desist and think no more of that matter, he declared to Tinwel in the presence of two other persons, that he was actually and really married to the lady, and that on the 16 Jan. 1735; and on being asked who was the clergyman or parson who married him, he refused to tell, saying it must be kept a secret from his father; after this he took the lady away, he cohabited with her, he acknowledged himself to be her husband and owned her for his wife, they visited as husband and wife, she was called*

called by his name, she had her arms with his engraven on a piece of plate, and whilst they thus lived together as husband and wife he had a child by her, the child was registred as the child of *Robert* and *Mary Hicks* in the parish of *St. Giles*, and that by *Mr. Hicks's* own direction. When the young lady, anno 1737, came of age, this bill was preferred by her brothers *Benjamin* and *Gregory*, against *Mr. Hicks* and their sister, by the name of *Mary Hicks*, and against *Tinwel* claiming the benefit of her forfeiture of what she had otherwise been intitled unto under the wills of her father and mother. *Mr. Hicks* put in four different answers, and in every one of them he denied his marriage. *Mary* answered also, but demurred to that part of the plaintiffs bill which required her to answer whether she was married to *Mr. Hicks* or not, as they did also to the inquiry whether she had not a child by him; and brought her cross bill by the name of *Mary Grayden* against the plaintiffs in the original cause, and against *Tinwel*, praying the benefit of what was bequeathed her by the said two wills. *Mr. Chute* for the plaintiffs in the original cause, for authority, cited *Rogers* and *Pain*, before lord *King*, 14 May 1720, and that of *Hicbocks* and *Hicbocks*, determined by his now lordship July 1737, also *Garbot* and *Hilton*, last week at the rolls. *Mr. Browne* on the other side cited the case of *Peyton* and *Bury*, at the rolls, [2 *Pe. Will.* 626.] 6 May 1731, and that of *Fountain* and *Harp*, also at the rolls, 13 March 1730. His lordship said, he had not seen a cause attended with such extraordinary circumstances, and that it was a melancholy thing so little regard should be paid to the injunctions of parents and the common rules of decency; however, it was not his office to determine upon the moral characters, but upon the legal and equitable rights of the parties; and that the questions are, 1st, Whether the lady is married or not? 2dly, And if she is, what are the consequences arising from thence, in respect to the portions given her by the wills of her father and mother? And as to the first of these, his lordship held that if she was married, it would be doing the lady a great injury to think otherwise, and that the evidence of it is so strong that any jury would credit it; but his lordship said it would be another question if this matter arose in a collateral cause, and between other parties; but between themselves, his lordship declared his opinion, that it is sufficiently proved, and that had it been at all doubtful, he should have directed an issue, but in the present case he thought it not proper. 1st, Because it is clear *Hicks* and she cohabited together as husband and wife. 2dly, She had a child by him; and observed, there's no proof offered on the part of the defendant in the original cause, to make this matter in the least doubtful. And the proofs for the plaintiffs are extremely strong. 1st, It is agreed on all hands that here was a courtship in order to a marriage, and that carried on in *Tinwel's* house, and that he very prudently acquainted Sir *Henry Hicks* therewith, and though Sir *Henry* disapproved thereof, yet the son would and did continue his addresses, and in July 1736 declared he was married 16 January 1735; this declaration he made in the presence of two other people. And to the question, Who it was that married them? he refused to answer, saying it must be kept a secret from his father; after all this, he took the lady away, lived with her, acknowledged her to be his wife, they visited together as such, she is called by his name, a piece of plate is engraven with both their arms; and what is more material than all the rest, she has a child

child by him, and that registred by *Hicks's* order as the child of *Robert* and *Mary Hicks* in the parish of *St. Giles*. This his lordship looked upon as such an evidence of a marriage as must convince any jury; and said that many verdicts in favour of marriage had been on such sort of evidence, especially where Inheritance is not concerned, nor other parties prejudiced. As to the consequences arising from this marriage, 1st, With regard to the will of the father, his lordship observed, it first related to 1000*l.* particularly given to this lady. 2dly, To a share in the surplus not before particularly disposed of. As to the clause of forfeiture his lordship said, that no ways relates to the share in the surplus; for which reasons she must clearly be intitled to that; and the clause of forfeiture, in this will, meerly relates to the 1000*l.* and is to this effect; *It is given to her, to be paid at 21, or day of marriage, which shall first happen. Provided she marries with the consent of the three executors, and if she does not, then it is given over.* All the executors died before she attained her age of 21, or married; wherefore his lordship held the consent of no other person was necessary; his lordship also observed the condition to be a subsequent one, and said it is the general rule of law, *that if such a condition become impossible the party is excused. On this foundation it is, that the cases have been in this court,* cited by the defendant's counsel, *that where a legacy is given upon a subsequent condition, that the party marry with the consent of his executors, and he appoints two, if one dies the party is at liberty to marry without the consent of the other;* nor can it be said at all, that the consent of *Tinwel* was necessary, who was administrator *de bonis non* of the father. What remains, relates to the will of the mother, and hereon two questions arise; one concerning the specific legacies given to the daughter; the other concerning the share in the surplus; and as to both these, his lordship's opinion was, that her interest in both was forfeited. The condition is inserted about the middle of the will, and is *My will is, that if my daughter marries before she attains her age of 21, without the consent of my executor under his hand and seal first had and obtained, if living, then she shall not be intitled to any part of such legacies as I have given her.* And this condition, his lordship held, related to all the legacies given her, as well to a share in the surplus as to the specific legacies. *A testator is considered as having the whole of the will in his thoughts at the same time, though he cannot speak the whole of his mind at once.* And his lordship further said, had indeed the condition immediately followed the bequest of the specific legacies, there might have been more colour for the objection; but as it was at a great distance from the first as well as the last, it ought in reason to extend to all; and his lordship said further, that the only doubt arises from this expression in the conditional clause, *namely, the legacies which I have given her;* but the whole of the legacies are to be considered as given at the same time. But it has been objected, that the marriage in the present case is not a breach of this condition; because *John* who was appointed executor renounced, and administration with the will annexed was granted to *Tinwel*; but his lordship was, notwithstanding this, of opinion, that the consent of *John* the son was necessary; for as his lordship observed, the word *executor* is descriptive of the person, and lands have often been given to persons under that name. It is a personal power given to him who was appointed executor; the words are, *if he be living,* which shews that he himself was personally considered.

For these reasons his lordship's opinion was, the plaintiffs in the original cause were intitled to all the benefit, under the will of the mother, which their sister would have had, provided she had married with the consent of her eldest brother; but *Hicks* hath been the occasion of the whole of the original cause, and as he hath denied his marriage by his answer, his lordship thought fit, and accordingly directed that he should pay the costs of this suit. Decreed *accordant*. *Grayden* and *Hicks*, in *Canc'* before lord chancellor, 7 December 1739.

5. See 1 *Chan. Ca.* 22, 53, 122, 138, 140, 141, 142. *Gilb.* 26. *Nelf.* 98, &c. 145, 234, 236, 183, 244, 261. 2 *Chan. Ca.* 1, 23, 95. 1 *Vern.* 20, 300. *Skin.* 285, &c. *Prec. Chan.* 348, 226. 2 *Pe. Will.* 626.

273. *Linea recta semper praefertur transversali.*

What.

1. 1st, **L**INEAL descent is conveyed downwards in the right line, as from the grandfather to the father, from the father to the son, &c. 2dly, Collateral is from the side of the lineal, as grandfather's brother, father's brother. *Co. Lit.* 10.

Who to inherit.

2. The father's brother and his posterity shall inherit before the grandfather's brother and his posterity; *et sic de caeteris*; for *propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem*. *Co. Lit.* 10. b.

3. He is nearest who is so *jure repraesentationis* as to descents; for legally he is nearest, and he represents the person of his ancestor, who would have been the nearest had he been alive, and therefore stands in his stead to inherit. See *Co. Lit.* 10. b.

4. Therefore if a man purchase lands in fee-simple, and die *sans* issue, his next cousin collateral of the whole blood, how far so ever from him in degree, may inherit, and have the land as heir to him. *Lit. sect.* 2. But this extends not to heirs in tail. *Co. Lit.* 10. a.

274. *Major haereditas venit unicuique nostrum a jure legibus, quam a parentibus.*

SEE rule, *Est boni judicis ampliare jurisdictionem*.

275. *Majus dignum trahit ad se minus.*

1. **A**N adulterer takes away another man's wife, and puts her in new clothes, the husband may carry away with his wife the clothes. 11 *H.* 4. 31.

2. A box sealed up with deeds goes to the heir together with the deeds, and not to the executor. 10 *Eliz.* 323.

3. A base mine, wherein is contained gold, shall go to the king, for the worthiness of the gold. 10 *Eliz.* 323.

4. The body of a man is more worthy than the land; therefore land shall ensue the nature of the person. 3 *Eliz.* 238.

5. If three jointenants be disseised, and they arraign an affise, and one of them releaseth to the disseisor all actions personal, this shall bar him, but it shall not bar the other plaintiffs; for, in regard to them, the realty shall be preferred; *et omne majus trahit ad se minus dignum*; and in a writ of ward brought by two, the release of the one shall not grieve the other, but shall inure to his benefit; for he shall recover the whole, and hold his companion out. *Co. Lit.* 285. a. See 1 *Show.* 21.

276. *Majus dignum praecedat.*

General.

1. **T**HE intire thing must be demanded in a *praecipe* before the moiety, part or parts. *Register.*
2. And that which is of greater dignity before that of less. *Register* 88.

Particular cases.

3. As an house before land, a castle before a messuage or a manor, arable land before meadow, pasture, wood, or any other soil; and that this is the course of the *Register*, see the same.

4. So in replevin, a suit is for two chattels, one living, the other dead; the live chattel shall be first demanded. *Register* 88. b.

5. Where two have the presentment to a church, one to have two turns the other the third, if he who hath the third turn be plaintiff in a *quare impedit*, he shall not begin first with his own turn, but with the other's two turns. *Dy.* 299. b.

277. *Majus dignum continet in se minus.*

VIDE rules, *Necessity creates equity.* *Accessorium sequitur principale.*

278. *Mala grammatica non vitiat chartam.*

THE law, that principally respecteth substance, must judge according to the intention of the parties, and not according to grammatical construction; for *mala grammatica non vitiat chartam.* *Co. Lit.* 146. b.

279. *Maledicta expositio est quae corrumpit textum.*

General.

1. **W**ORDS superfluous, vain and idle, which destroy the design, are to be rejected and laid aside. *Et maledicta expositio est quae corrumpit textum.* 4 *Co.* 35. a. *Vide post.* case 5. 6.

So the king's grant, general,

2. See 4 *Co.* 34 et 35, &c. *supra*, being *Bozoun's* case.

3. It

3. It was said by *Coke* chief justice, and affirmed by the other justices, that of late such nice and strict constructions had been made of some letters patent, as to subvert the force and effect of them, and many good ones had been drawn in question, to the dishonour of the king, disinherison of the subject, and against the true reason and antient rule of law. *Et talis certitudo certitudinem confundit*. Such nice and captious pretence of certainty confounds true and legal certainty; *Et maledicta expositio est quae corrumpit et confundit textum*. 8 Co. 56. b.

4. The grants of kings are so to be construed as shall be beneficial for his honour and the relief of the subject, and not to be strict or literal in subversion of such grants. 6 Co. 6. a.

Particular cases.

5. In the principal case it was resolved, that the king was not deceived in his grant; for he had recited the estate of the tenant for life, and that he was alive; so as the king knew very well he could not grant in possession that which another had for his life; but it ought to take effect as it may by law; and the case of lord *Chandos*, 6 Co. 55. was resolved a stronger case; for there the king mistook the law, thinking that by the surrender of the letters patent the estate-tail was extinct, and that he thereupon was seised in fee, and so granted the manor in possession, and yet the reversion passed without any word of reversion; for the grant ought to take effect as by law it may: but in the case at bar the king mistook nothing, nor did he take upon him to grant what he had not power to grant, neither was he deceived in any part of his grant. And when the king's charter may be taken to two intents good; in many cases it shall be so understood as is most beneficial for the king; but if they may be taken to one intent good, and to another intent void; then for the honour of the king, and the benefit of the subject, it shall be so taken that the king's grant may take effect, for it was not the king's design to make a void grant. 8 Co. 56. a.

6. King *Richard II.* granted to the abbot of *Waltham*, that he nor his successors should not be *collectores decimarum, &c. concess. regi per clerum Angliae, nec alicujus inde parcelae*: in this case if the grant should be taken literally, *per clerum Angliae*, i. e. *per totum clerum Angliae*, the grant is void; for all the clergy of *England* never convened in or came to one convocation, but each province had a separate convocation; and therefore the grant of the king shall not be taken in such a sense as to make them void, but in such a sense as may make them stand in law, &c. and this is a stronger case than the case at bar; for there the letter of the grant well standeth with the intention of the king, &c. but in the case of the grant to the abbot of *Waltham*, the letter of the grant and the intention of the king vary, and there the letter gives way to the intention of the king, &c. 8 Co. 56. a. b.

7. It was resolved in the case of the king's auditor, where the queen grants a manor to *B.* and his heirs, in the premises of the letters patent, to have and to hold to him and his assigns, omitting heirs in the *habendum*, yet the fee passeth by the premises, and the *habendum* is void; for the premises were sufficiently certain to pass the fee-simple, and the omission in the *habendum* shall not vitiate what was certain by the premises; for the queen's intent appeared by the premises to pass the fee-simple; and her grant ought to be taken *secundum intentionem regis, et non in deceptionem regis*; which would

be a great indignity to the king to make his grant under the great seal, of things which he might lawfully grant, to be void and of none effect, *quia apices juris non sunt jura*, &c. 8 Co. 56. b. 57. a.

8. See rule, *Apices juris non sunt jura*.

280. *Malum quo communius eo pejus.*

THE intention of the statute to suppress superstitious uses, was to prohibit all such superstitious uses as were public in churches, for the general mischief which might grow from them; for *malum quo communius eo pejus*, and not to forbid private prayers in their chambers or like private places; which cannot be attended with such ill consequences, and to so dangerous examples. 4 Co. 109. b. *The antiquity and frequency or prevalence of a mischief greatly aggravates it.* See rule, *Communis error facit quasi jus*.

281. *Marriage the highest consideration in law.*

General.

1. THAT marriage is the very highest consideration in the law, see 2 Mod. Ca. 17.

2. A settlement on marriage is not to be set aside, there being no fraud or incapacity in the husband; but general that he was weak. It is not necessary that he should be a learned or an ingenious man. 2 Mod. Ca.

Particular cases.

3. Marriage contracts made in all countries, are to be observed in all; and therefore a contract made in *France* was enforced here. *Préc. Chan.* 208.

4. Marriage even without a portion paid, is a sufficient consideration to give the grantee greater equity than the heir. 1 Vern. 17.

5. The plaintiff, the duke of *Norfolk*, married Sir *Henry Wood*'s daughter, and now comes as administrator of his said late wife, by this bill, for an account of the personal estate of his said late wife, (to wit) the profits of her real estate received by the trustees in her life-time. The case arises upon the construction of a deed of settlement and will of the said Sir *Henry*, wherein (*int' al'*) it was recited that a marriage was intended between the plaintiff and the daughter of the said Sir *Henry*, and then comes a clause, in case the daughter should live to attain the age of 16, and should refuse to marry the plaintiff, then the plaintiff should have 20000*l.* out of his personal estate; and after comes another clause, that if it should happen that the said intended marriage should not be till after his daughter was 16, then he settles his real and personal estate upon the duke the plaintiff and his wife, for their lives, &c. The marriage takes effect, the lady under 16, and she dies before 17 without issue; account decreed. 1 Vern. 339.

6. Articles, covenant, or even a bare promise before marriage to settle a jointure, shall be executed in equity against the heir. 1 Vern. 17.

7. So where the husband covenanted that the lands settled in jointure, were of such a value. 1 Vern. 217.

8. So where the father offered 1500*l.* with his daughter. 1 Vern. 201.

G g g

9. So

9. So where a brother promises that, if the wife's fortune made so much, he would leave his brother, the husband, his estate, and he after married himself, and settled the same on his wife, &c. yet the agreement was decreed; the marriage taking place upon the expectation of the performance of this promise. 2 *Vent.* 353.

10. A man makes an agreement with the mother of the wife, previous to the marriage, and after the marriage had, comes to a new agreement; the first agreement being more beneficial to the issue of the marriage, was decreed to be performed. *Nels.* 91, &c.

11. A man makes a settlement in consideration the wife had parted with her former settlement made after the marriage, but in consideration of a marriage fortune secured, but no proof of any previous agreement, yet the court presumed it, so not merely voluntary, but good against creditors. *Prec. Chan.* 101.

12. The husband was to make a settlement on the wife, and in consideration thereof to receive the fortune; the wife dies *sans* issue before the settlement made; the husband shall not have the fortune, for the settlement was a condition precedent. *Gilb.* 188.

There are many cases in the books to shew that agreements made in derogation of the marriage contract are to be set aside, whether by way of marriage-brochage or secret trust or conveyance, in fraud of the marriage agreement, &c. and also that agreements of a third person have been enforced, where it has been the consideration of, and real occasion of the marriage.

Of what things marriage is a suspension.

* 13. When a power was given to a woman, at the time unmarried, to dispose by will; and she afterwards married. Decreed, that the marriage is a suspension of her power, but if she survives her husband the power revives. See case before the house of lords 9 Feb. 1727, *Rich* and —. See 1 *Chan. Ca.* 117. *Prec. Chan.* 41, 237, &c. 408. 2 *Cro.* 170, 571. 1 *Sid.* 58. 5 *Co.* 70. b. *Mo.* 855. *Lit.* 32. *Hob.* 216. 1 *Cro.* 373. 8 *Co.* 136. *Co. Lit.* 264. b. 343. b. *Dy.* 140. *Yelv.* 156. *Ro.* 935. 2 *Cro.* 222. *Salk.* tit. *Extinguishment.*

What a good evidence of marriage, cohabitation, &c.

14. See case *supra Grayden and Hicks*, sub tit. *Limitations, in restraint, &c.*

Church books.

15. * Entry of a marriage in a church book, no evidence of that marriage, unless the identity of the persons be sufficiently proved; or the same be strengthened by proof of cohabitation, or allowance, or confession of the parties. See case in the house of lords *Draycot and Talbot*, 28 Jan. 1718.

16. References, 1 *Rep. Chan.* 216. 1 *Vern.* 406, 427. 2 *Chan. Ca.* 29, 30, 87, &c. 1 *Rep. Chan.* 275. *S. G.*

282. *Matter of higher nature determines that of more base or inferior nature.*

1. **I**F an offence which is murder at law, be made high treason, no appeal lies of it; so that the lesser offence, namely the murder, is gone, and the offence is now to be considered high treason, whereof no appeal lieth. Dy. 50.

2. Where one hath a liberty by prescription, and takes a grant from the king by patent, this determines the prescription; for matter in writing determines matter in deed. 21 H. 7. 5. So, as I take it, if one indebted to another on simple contract, gives specialty for the same debt, the simple contract is gone, or if articles on marriage or the like, are reduced into a formal settlement, the articles, &c. are no more to be considered in law; though on circumstances of fraud or practice, a court of equity possibly may resort back to the articles, and consider the original agreement, and how far the settlement is pursuant.

283. *Melior et tutior est conditio possidentis.*

1. **M**ELIOR est conditio possidentis ubi neuter jus habet. Jenk. 118.

2. It is regularly true in law, that if upon the whole record it appear that the plaintiff had no cause of action, and especially if that appear of his own shewing, that the court shall never give judgment for him, however the defendant has misbehaved himself in pleading; for *melior est conditio possidentis*; and the defendant is safe if the assailant mis him; for *vana est sine viribus ira*. Rigway's case, 3 Co. 52. and Barton's case, 5 Co. 69.

3. See Hob. 103, 199.

284. *Meliorem conditionem ecclesiae facere potest praelatus, deteriorem nequaquam.*

General.

1. **D**ilapidations and diminutions of ecclesiastical livings are torts, and are quodammodo punishable at law; for the master, dean, &c. for dilapidations and waste, or diminution of the revenues of their houses, &c. might be deprived, as appears by 35 E. and 29 E. 3. 16. 2 H. 4. 3. 11 H. 6. 20 H. 6. 46. 9 E. 4. 34. Godb. 259. 1 Ro. 335. 2 Bull. 158.

2. Lord Coke saith, Wherever Littleton putteth his case of an abbot or prior, the same law is of a bishop, dean, archdeacon, prebendary, parson, vicar, and the like. And another thing his lordship observed was, that an abbot or prior cannot disclaim, &c. for regularly it is true, *quod meliorem conditionem ecclesiae suae facere potest praelatus, deteriorem nequaquam*; and again, *ecclesiae suae conditionem meliorem facere possunt sine consensu, deteriorem non possunt sine consensu*; therefore none of these may disclaim; because they alone cannot devert any fee which is vested in their house or church; for the wisdom of the law would never trust one sole person with the disposition of the inheritance of his house or church: but an abbot or prior hath his
convent,

convent, the bishop his chapter, the parson and vicar their patron and ordinary, &c. *sans* whose assent they could not pass any inheritance. Co. Lit. 102. b. 103. a.

3. Remedy by prohibition is against any pulling down the house, &c. or other waste against the incumbent. Mo. 917.

Particular cases.

4. If the parson of a church will do waste to the inheritance of his church, for his own private gain, in felling trees; the patron may have a prohibition against him; for the parson is seised as in right of his church, and his glebe is the dower of his church, for thereof it was endowed; and so speak many antient records. 11 Co. 49. a.

5. 2 H. 4. 3. b. if the bishop or archdeacon abate, and fell all the trees, he shall be deposed as a dilapidator. 29 E. 3. 16. *accordant*. Vide 27 Aff. pl. 10. 20 H. 6. 46. 10 E. 4. 19. And the treatise intituled *Ne rectores prosteruant arbores in coemeterio*, which is but a declaration of the common law, in these words, *Prohibemus ne ecclesiarum rectores arbores in coemeterio crescentes praesumant prosteruere indiscrete, nisi cum cancellus ecclesiae necessaria indiget refectione, &c.* and this is generally true, *meliozem conditionem ecclesiae facere potest praelatus, deteriozem nequaquam*. 11 Co. 49. b.

6. The plaintiff, patron, brought a bill, setting forth that the defendant parson had committed waste, and therefore prayed an injunction to restrain future waste, and an affidavit was made of the waste done. The lord chancellor said he was fully satisfied that the injunction ought to be granted, and said it appeared 11 Co. 49. that the patron may have a prohibition in the courts of law, in a case of this nature. So if a prebendary commits waste in his prebend. The bishop of *Durham* committed waste, whereupon redress was by writ out of chancery, that neither he nor his servants commit waste in the premises. And his lordship said, that the resolution of the parliament was agreeable to the reason of the case before mentioned, namely, that as in the former cases where private persons are patrons, the remedy for them is by prohibition; so in case of bishopricks where the king is patron, there ought to be the like remedy. 3 Ro. Abr. 85. There are three or four instances wherein prohibitions have been granted in the case of waste committed by ecclesiastical persons. A prohibition was the ordinary remedy for waste at common law, and on that ground it is that injunctions of that kind are granted in this case; for these reasons his lordship said, the patron may have an injunction, &c. and ordered accordingly. Barn. 399, 400. *Ecclesiasticks and their ministers and officers are compelled to their duty by Mandamus from the temporal courts, as well as by church censures; and they are restrained from committing oppression and wrong, not only by the censures of their own courts, but also by prohibition and praemunire from the temporal courts, which have full authority to deal out to them a just proportion of punishment for such oppression and wrong.*

7. See 2 Bull. 279. 2 Ro. 335. 2 Ro. Abr. 813. Mo. 917. 1 Ro. 199, 252. 3 Bull. 116, 119, 158. 1 Show. 353. Het. 30. Far. 127. Show. Par. Ca. 62. 1 Vent. 307, 316, 323. 1 Keb. 354. 2 Ju. Eccl. fo. 357 to 362, 415, &c. pretty fully of this doctrine, and *Watson* bishop of *St. David's* case taken upon an excommunication, in *Salk.* and also in *Farewell* and in 2 Ju. Eccl. 365, &c. S. C.

285. *Mens testatoris in testamentis spectanda est.*

General.

1. **I**T is agreeable to law and justice, and to true piety, to see that the will of the dead be performed; and though the law has ascertained how estates shall go where there is no will; yet where there is one, and that disposes otherwise than the law would, in such case the law will compel a performance. *Show. Parl. Ca.* 196.

2. ——— *Legum servanda fides; suprema voluntas*
Quod mandat, fierique jubet, parere necesse est.

3. In wills the intention of the party is to be regarded; for the statute 21 H. 8. leaves the testator at liberty to express his mind as he pleaseth; but of conveyances which are at common law it is otherwise; for they are tied up to set forms and set words. 7 Co. 40.

4. It is only the intention of the party, which both makes and revokes a will. 1 Ro. Abr. 615. Mo. 429. Cro. Ca. 23. Sid. 90. 1 Keb. 357. *Show. Parl. Ca.* The earl of Lincoln's case, and Seymore and Nosworthy's case, in *Hard.* 374.

5. *In testamentis ratio tacita non debet considerari, sed verba solum considerari debent. Multa possunt movere mentem testatoris, quae nos latent; ideo per divinationem mentis durum est a verbis recedere.* 2 Chan. Ca. 155.

6. Wills are to be construed according to the intent of the testator, 1 Chan. Ca. 79, 80. 2 Chan. Ca. 11. Pop. 131. Nels. 159, 160. Gilb. 11, 118, 133, 209. Nels. 354, 433. Plow. Com. 523. b. if consistent with the rules of law. * See case before the house of lords Sparrow and Shawe, 15 April 1729.

7. The will of the devisor, expressed by his testament, shall be performed according to his intent, *secundum veram intentionem suam.* Co. Lit. 322. b.

Particular cases.

* 8. The case was, The devisor being seised in fee devised to his wife for life, and 500*l.* more to her to be raised by sale of timber, coals, or any part of the estate, at her election, and in case she died before it was raised, then she had power, by deed or will, to appoint to raise it in like manner; but if the trustees, or those for whom they should stand seised, and particularly the devisor's two sisters, who were the next takers, should raise the same, then the power to cease. And, after the decease of his wife, he devises to his said trustees and the survivor, without the words, *their heirs, or the heirs of the survivor*, subject as aforesaid, in trust for his sisters A.L. and D.E. equally betwixt them during their natural lives, without committing of waste; and if either of his sisters die leaving issue or issues, then for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them and their respective issue or issues; but if it shall happen that both my said sisters die without issue as aforesaid, and their issue or issues to die without issue or issues lawfully to be begotten; then the trustees to stand and be intrusted for *several others over* in remainder. One of the sisters dies without issue, and the other enters, and levies a fine and suffers a recovery, to make herself mistress of the fee, and

H h h

well,

well, for she had an estate-tail. See case * *Sparrow* and *Shaw* before the house of lords 17 March 1729-30. See also case * *Davies* and *Gibbs*, 17 March in the same year. Also the earl of *Tankerville* and *Gray*, 14 March 1728, all before the house of lords; and also case * *Coleson* and *Coleson*, at the rolls 20 July 1739.

How to be construed.

General.

9. All the words of a will must stand together. *Nelf.* 27. 1 *Chan. Ca.* 309. And it must not be made void, if by any construction of law it can be made good. 1 *Chan. Ca.* 178. *Nelf.* 403.

Who may take.

10. *Lord chancellor*: Without question one may take as heir male of the body of a person deceased, who is no heir general of the same person; 1st, Because the intent of the testator is manifest and appears at first view, who was the person meant to take thereby. 2dly, The distinction between taking by purchase and taking by descent, where the words are the same, though it be mentioned in books of good authority, yet it seems to have no good foundation of reason or of law to support it; and if it should prevail in all cases, it would overthrow another rule of law, as certain and as well established, which is, that a person may take by purchase, if he be sufficiently described, though he has neither addition of christian or surname given him; nay though his christian name be false or mistaken; as appears by several cases in *Co. Lit.* 3. a. and if so, certainly such description of the person, as has all the marks and characters whereby he may be known, and is defective in none, must be sufficient to intitle him under that description. *Gilb.* 133.

Where the residue undisposed.

11. The residue undisposed of is to be distributed according to the statute, there being legacies to the executors; for the presumption is, by giving them legacies, he intended them no more than what he had so expressly given them in his will. *Gilb.* 74, 75, 126, 184, 200, 208, 209. 1 *Vern.* 473. 2 *Vern.* 648. *Prec. Chan.* 82, 92, 94. *Nelf.* 177, 178, 351, 352. *Prec. Chan.* 231, 263, 264, 324. 1 *Pe. Will.* 7, 8, 9. 2 *Ju. Eccl.* 48. ca. 6. and fo. 50. ca. 9.

As to averments dehors.

12. If a man devise lands to his wife for life generally, it may not be averred to be for her jointure, and in satisfaction of her dower, and that for two reasons. 1st, Because a devise imports a consideration in itself, and therefore as a devise may not be averred to be to the use of any other than the devisee, unless it be expressed in the will, no more may a devise be averred to be for a jointure or in lieu of dower, unless it be expressed in the will; but shall be taken for a benevolence. 2dly, All the will concerning lands per le stat. 32 & 34 H. 8. ought to be in writing, and no averment ought to be taken out of the will, but what may be collected from the words contained in the will. 4 *Co.* 4. a. See stat. of *Frauds*, and *Selwin* and

and *Brown's* case in 2 *Ju. Eccl.* 50. where this doctrine seems now to be fully settled.

13. References, *Jenk. Margin* 277. 2 *Chan. Ca.* 10, 11, 155. *Mo.* 145. 1 *Co.* 176. 2 *Co.* 76, 4 *Co.* 3, 4, 71. 5 *Co.* 26, 68. 7 *Co.* 40. 8 *Co.* 155. 1 *Mod.* 117. *Salk.* 232, 235. 1 *Lutw.* 735, 791. *Ro. Ab.* 579, 413, 414. 2 *Bro. Abr.* 2, 676, 750, 779, 790. 2 *Leon.* 70. *Mo.* 222, 356, 592. *Godb.* 131, 432. *Jenk.* 115. 1 *Vern.* 20, 30, 37, 38, 254. 2 *Vern.* 98, 100, 252, 337, 339, 517, 539, 559, 647, 648, 738. *Nelf.* 312, 313, 403.

286. *Minima poena corporalis est major qualibet pecuniaria.*

SEE rules, *Corpus humanum non recipit aestimationem.* Equity regards substance, &c.

287. *Mispleading shall not prejudice in chancery.*

General.

1. THE course of the chancery is the law of the chancery. 1 *Chan. Ca.* 106, 92.

2. Chancery is not unbounded, but limited by precedents and the practice of former times, and it is dangerous to extend its authority further. 3 *Ch. Ca.* 95, 136.

Rules and their reasons.

3. Where there is right and equity, forms of that court and orders shall not hinder to examine. 2 *Chan. Ca.* 251.

4. In chancery a man shall not be prejudiced for mispleading or want of form, &c. *Elf. Obs.* 30.

5. Note; The chancellor said that a man shall not be prejudiced by mispleading or for default of form; but according to the verity of the matter; and the chancellor must judge *secundum conscientiam, et non secundum allegata.* *Elf. Obs.* 69.

6. Mispleading or default of form shall not be prejudicial in the chancery. *Elf. Obs.* 69.

7. In pleading, a default in form shall not, in any case, be prejudicial in the chancery; for it cannot be called a court of conscience, if the act of the clerk in pleading should cause the party to lose his suit and his expences. *Elf. Obs.* 67.

8. In chancery it is not necessary or requisite that the bill be all certain, according to the solemnity of the common law, for it is but a petition. *Elf. Obs.* 68.

9. Chancery is always open; it is the refuge of the poor; it correcteth the rigour of the law (yet the acts thereof shall do no prejudice); it hath an admiral jurisdiction, and hath, at least, a concurrent jurisdiction with the ecclesiastical courts. *Elf. Obs.* 2 *Chan. Ca.* 217. *Nelf.* 438. *Gilb.* 1.

10. It hath jurisdiction of infants, ideots, lunatics, in cases of femes covert, of trusts, matters of fraud, accidents, forfeitures and penalties, to relieve against the severities of law, and to give relief where none at law, and is only controulable in parliament, &c. See before *sub tit. Chancery, &c.*

the

the several divisions. *Elf. Obf.* 2 *Chan. Ca.* 217. 3 *Chan. Ca.* 136. *Gilb.* 1, 2, 172, &c. 119, 120. 1 *Chan. Ca.* 201. *Nelf.* 438. 1 *Vern.* 176. *Hard.* 23; 120.

288. *Modus et conventio vincunt legem.*

Particular cases.

1. **T**O every tenant for life, the law, as incident to his estate, without provision of the party, giveth him three kinds of estovers, *i. e.* 1st, House-boot, which is two-fold, *viz.* *Estoverium aedificandi, et ardendi.* 2dly, Plough-boot, *i. e.* *Estoverium arandi.* And 3dly and lastly, Hay-boot, *i. e.* *Estoverium claudendi.* And these estovers must be reasonable, *estoveria rationabilia*; and these the lessee may take upon the land without assignment, unless restrained by special covenant; for *Modus et conventio vincunt legem.* *Co. Lit.* 41. b.

Where relieved against.

2. The plaintiff put his son clerk to the testator of the defendant when he lay ill of the sickness whereof he died, and gave 120*l.* and articles were had, wherein it was provided, that in case the master should die within a year, that then 60*l.* of the money should be returned; the master never recovered, but died in three weeks. The court, notwithstanding the parties had provided against accidents, for a certain sum to be returned in case the master died, and that *Modus et conventio vincunt legem*, decreed 100 guineas to be paid back to the plaintiff the father. 1 *Vern.* 460.

3. An apothecary takes an apprentice with a sum of money, and puts him away, for misdemeanors, after he had lived some time with him. The court decreed the master to refund 30*l.* of the money; and the rather because the indentures were not inrolled, so as the matter was not properly cognizable before the chamberlain of London. 2 *Vern.* 64.

4. References, *Co. Lit.* 19. a. 12 *Co.* 72. *Hob.* 160. 1 *Chan. Ca.* 84, 85, 110.

289. *Moneta est justum medium et mensura rerum commutabilium.*

General, to its use, and what it is.

1. **E**VERY commonwealth ought to have a certain standard of money; for none can be without contract, and no contracts without equality; and that cannot be without money; for though at first exchange was in use, yet that was found very inconvenient, and in many cases impossible, through the difficulty of dividing of many things, and other like obstacles; and therefore money was invented, as well for the convenience of commerce as for the reducing contracts to equality. *Moneta est justum medium et mensura rerum commutabilium*; nam per medium monetae fit omnium rerum, quae in mundo sunt, conveniens et justa aestimatio. And to this intent it was that *Keble* said 12 *H.* 7. 23. b. That every thing might be valued by money, by which words is to be understood, money coined; and the great advantage of having

having a certain standard of money and of measures is well shewn by *Budelius* in these verses,

*Una fides, pondus, mensura, moneta sit una,
Et status illaesus totius orbis erit.*

Dav. 19. a.

Wherefore so called.

2. *Moneta dicitur a monendo ; quia impressione nos moneat cujus sit moneta. Cujus imago et superscriptio est haec.* Dav. 19. b. Hob. 43.

How made and what necessary thereto.

3. Three things are necessary to the making of lawful money. 1. Authority of the prince. 2. The print. 3. And the value. Though there are six things or circumstances which ought to concur for the making lawful or currant money. 1. Weight. 2. Fineness. 3. Impression. 4. Denomination. 5. Authority of the prince. 6. Proclamation, &c. Dav. 19. b. 20. a. See Next division.

From whence it receives its value, &c. from the king.

General.

4. The king only can coin or make money within his dominions, and no one else without his licence, and if any presume to do it, it is treason at common law ; as appears by stat. 25 E. 3. cap. 2. which is but a declaration of the common law ; and by *Glanvil*, *Britton* and *Bracton*, before this statute, *Stamford fo. 2 et 3.* and in the case of mines, *Plow. Com. 316. a.* this matter is most clear, and there it is said that the king shall have all gold and silver mines ; because if the subject was allowed them, yet by law he could not coin them, or set value upon them ; for that belongs only to the crown ; and that only is the thing which makes it currant. Da. 19. a. b.

Particular.

5. And that the king by his prerogative might set a price or valuation upon all coins, appears from this extraordinary case 21 E. 3. 60. b. In the time of the conqueror the abbot of *St. Edmonds Bury* complained to the king in parliament, that whereas he was exempt from the jurisdiction of the ordinary by several antient charters, that the bishop of *Norwich* had visited his house against those charters of exemption ; wherefore it was granted and ordained in parliament, that if for the time to come the bishop of *Norwich*, or any of his successors, should go against the exemption aforesaid, they should pay to the king or his heirs, 30 *Talentes* or *Besautes*. After this, viz. in the time of E. 3. the bishop of *Norwich* visited the house again, against the ordinance aforesaid ; and this contempt being found in *B. R. a sci. fa.* issued against the bishop, to shew wherefore he should not pay the king the 30 *Talentes* or *Besautes* ; and upon an insufficient plea pleaded by the bishop, the court awarded that the king should recover the *Talentes* or *Besautes*, and that the taking should be interpreted by the king himself ; for these *Talentes* or *Besautes* being uncertain in their value, as *Budeus* saith, *Quod talenta sunt varia, et pondera sunt potius quam numismata,*

1a, the king hath the power of setting a certain value upon them, according to the rule, *Monetae aestimationem dat, qui cudendi potestatem habet*; and in this point the common laws of England agree well with the rules of the civil law, *Jus cudendae monetae ad solum principem, hoc est, imperatorem de jure pertinet. Monetandi jus principum ossibus inhaeret. Jus monetae comprehenditur in regalibus, quae nunquam a regio sceptro abdicantur.* And yet by antient charters this prerogative hath been communicated to some subjects, as the archbishop of Canterbury, the archbishop of York, and the bishop of Durham, the dean of St. Martin's le Grand, &c. Da. 20. a. b.

He may make it of what matters, in what form, he may establish the standard or change it in substance or impression, or inhanse, debase, or decry it, &c. at his royal will.

6. As the king by his prerogative may make money of what matter and in what form he pleaseth, and establish the standard of it, so he may change it in substance and impression, and inhanse or debase the value of it, or utterly decry it to meer bullion; and this is *Moneta defensa et prohibita*, &c. and that the king hath exercised this authority, appears from many notorious changes of money, made in the reigns of several kings since the conquest, which changes were made by the kings without parliament, though there have been many acts of parliament for the ordering of exchange, and prohibiting the exportation of money made and ordained by the king, and the importation of foreign and false money, &c. Da. 20. b. 21. a. &c.

He may make foreign coin currant.

7. As Spanish silver, &c. made currant by the king's proclamation, is lawful money of England; so French crowns were lawful money by proclamation. And so the king, by his absolute prerogative, may make any foreign coin currant, and lawful money of England at his pleasure. 5 Co. 114. b.

290. *Mortgage may not be redeemed when the mortgagee cannot compel payment of the mortgage money, for that the remedy ought to be reciprocal.*

1. **T**HIS rule carries its reason with it.

2. References, 1 Chan. Ca. 1, 2, 63. 1 Rep. Chan. 122, 123. 2 Rep. Chan. 58, 159, 247. 1 Vern. 7, 8, 192, 215, 268. 2 Vern. 84, 288.

291. *Multa transeunt cum universitate, quae per se non transeunt.*

1. **I**F a man, seised of lands as heir of the part of his mother, makes a feoffment in fee, reserving rent to him and to his heirs, this rent shall go to the heirs of the part of the father; but if he makes a gift in tail, or a lease for life, reserving a rent, the heir of the part of the mother shall have the reversion; and the rent also, as incident thereunto, shall pass with it; but

but the heir of the part of the mother shall not take advantage of a condition annexed to the same; because it is not incident to the reversion, nor can pass therewith. *Co. Lit. 12. b.*

2. If a man had been seised of a manor as heir of the part of the mother, and before the statute of *Quia emptores terrar'* had made a feoffment in fee of parcel, to hold of him by rent and service, altho' they be newly created, yet for that they are parcel of the manor, they shall with the rest of the manor descend to the heir of the part of the mother, *Quia multa transeunt cum universitate, quae per se non transeunt.* *Co. Lit. 12. b.*

3. If a man hath a rent-seck of the part of his mother, and the tenant of the land grant a distress to him and his heirs, and the grantee dieth, the distress shall go with the rent to the heir of the part of the mother, as incident, &c. *Co. Lit. 12. b. 13. a.*

4. A man seised as heir of the part of his mother, makes a feoffment in fee to the use of him and his heirs, the use, being a thing in trust and confidence, shall ensue the nature of the land, and descend to the heir of the part of the mother. *Co. Lit. 13. a.*

5. A man hath a feignory as heir of the part of the mother, and a tenancy doth escheat, it shall go to the heir of the part of the mother. *Co. Lit. 13. a.*

6. If the heir of the part of the mother, of lands whereunto a warranty is annexed, is impleaded, and vouch, and judgment is given against him, and for him to recover in value, and dieth before execution, the heir of the part of the mother shall sue execution to have in value against the vouchée; for the effect ought to pursue the cause, and the recompence shall ensue the loss. *Co. Lit. 13. a.*

7. To every tenant for life, the law, as incident to his estate, without provision of the party, giveth three kinds of estovers, &c. and these the lessee may take upon the land demised, without any assignment, &c. *Co. Lit. 41. b.*

8. The tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred nor forfeited to any other, no more than a foundryship of an house of religion, &c. *Co. Lit. 99. a.*

9. A man seised of lands in fee, hath divers charters, deeds and evidences, and makes a feoffment in fee, either with or without warranty, only against him and his heirs, the purchaser shall have all the charters, deeds and evidences, as incident to the land, *et ratione terrae*; to the end he may better defend the land himself, having no warranty, to recover in value; for the evidences are as it were the sinews of the land, and the feoffor not being bound to warranty, hath no use of them, &c. *Co. Lit. 6. a.*

10. If a nobleman, knight, esquire, &c. be buried in a church and have his coat-armour and pennons with his arms, and such other ensigns of honour as belong to his degree or order set up in the church: or if a gravestone or tomb be laid or made, &c. for a monument of him, here, though the freehold of the church be in the parson, and that these are annexed to the freehold, yet cannot the parson or any other take them or deface them, but he is subject to an action from the heir of him in whose honour and to whose memory they were set up; and some hold that the wife or executor, who first set them up, may have an action against any who deface them

them in their time. *Co. Lit.* 18. b. 3 *Inst.* 202. 12 *Co.* 104, 105. *Mo.* 878. *Godb.* 200, 279. *Ro.* 57. *Lamb.* 496. *Noy* 104. *Sid.* 206. *Ro. Ab.* 625.

11. So a coat of arms placed in any window, or monument in the church or church-yard, cannot be beaten down or defaced, by the parson, churchwarden, ordinary or any other; and if they be, the heir by descent, interested in the coat, may have an action upon the case; for the heir is inheritable to the arms as to an heir-loom. *Cro. Jac.* 366. *Salk.* 347.

12. References, *Dal.* 93. *Ro. Ab.* 827. 2 *Ro. Ab.* 791. *Co. Lit.* 27, 54. 1 *Co.* 87. a.

13. See rule, *Accessorium sequitur principale.*

292. *Natura appetit perfectum.*

1. *Commenda semestris* grew out of a natural equity, that in the time of the patron's respite given him to present, the church should not be without a provisional pastor, which was a law of necessity, agreeable to the law of nature; and this might, upon the same reason, be continued with revenues, so long as this respite lasted. But after the lapse justly incurred, the *commendam* is to cease, for then the ordinary may collate; for *natura appetit perfectum*, &c. 18 E. 3. 21. and 1 H. 7. 21. The bishop may sequester if the king present not; and 12 H. 8. 8. by *Pollard*, the bishop must see the cure served if the parson fail, at his own cost. And *Linw. de jurejurando, cap. Presbyt. verb. oblationis.* If a bishop celebrate divine service in any parish of his diocese, he may require the offerings of that day. And upon the same reason, if the executors being called by the ordinary, will not prove the will, the ordinary may commit administration till they do it. *Hob.* 144.

2. *Vide* rule, *Bonum necessarium extra terminos necessitatis non est bonum.*

293. *Necessitas facit illud licitum quod non est necesse ad alios.*

1. *R*eferences, 1 *Ro.* 452, 474. *Mo.* 902. *Hob.* 144.

2. See also last rule.

294. *Necessitas legum vincula irridet.*

1. *R*eference, *Hob.* 159.

2. See rules, *Natura appetit perfectum.* *Lex necessitatis est lex temporis.*

295. *Neceffitas vincit legem.*

General.

1. *S*æpenumero neceffitas vincit communem legem, et quod neceffarium eft licitum eft.

Particular.

2. As if two jointenants are of lands, to them, and to the heirs of one of them; they may not join in a writ of right; but two jointenants, and to the heirs of one of them of an advowson, shall join in a writ of right of advowson; and the reason of the difference is, because in the first place they have several means and remedies, as is agreed in 46 E. 3. 21. but in the other case, if tenant for life do not join with him in fee, neither the one nor the other should have any remedy; and therefore in such case *neceffitas vincit legem.* 5 Co. 40. b.

296. *Necessity creates equity.*

1. *A* Bill was to examine witnesses *in perpetuam rei memoriam*, to prove a *Modus decimandi*. The defendant demurred, for that the bill was to establish a custom against the church, and in prejudice of tithes, which are due *de communi jure*. Demurrer over-ruled. 1 Vern. 185.

2. The defendant pleaded he was a purchaser *bona fide*, for a valuable consideration, but there being several badges of fraud alledged in the bill, though the defendant had in his plea denied them, yet as he had not denied them by way of answer, that so the plaintiff might be at liberty to except, the plea was over-ruled. 1 Vern. 185.

3. After recovery or verdict at law, resolved on demurrer, that the party shall not be put to answer. 1 Vern. 176. Stat. 4 H. 4. Hard. 23, 120.

4. The motion was for a *superfedeas* to a writ *de cautione admittenda*, for that they had taken a writ to the sheriff without any affidavit filed, that the bishop refused to admit of caution, &c. and for that reason a *superfedeas* was awarded. And the lord keeper declared, that finding the court often troubled for writs *de cautione admittenda*, he thought the right of it was, that if there was a sentence for a man to pay money, or to do other matter in the spiritual court, he ought to perform that before he is admitted to his writ *de cautione admittenda*; for it is in vain to take security *parere mandatis ecclesiae*, whilst a man refuseth to obey the sentence. But the reporter puts a *quaere*, and supposeth a man to be excommunicated for not coming to church, or not receiving the sacrament, how can he do that till his caution is admitted, and he absolved? 1 Vern. 119.

5. Lands were settled on *Davies* and his wife for their lives; remainder to trustees to preserve contingent remainders; remainder to their first and every other son in tail male. The plaintiff and his wife had been 12 years married and no issue, and having contracted debts, the bill was, that they might be enabled to sell part to pay their debts. The defendant, the

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trustee,

trustee, set forth the settlement, and confessed that the plaintiffs had been so long married, and had no issue, and believed they never would have any, and that they had contracted several debts, and submitted to do as the court should direct, being indemnified. And for the plaintiff it was said, that in such cases, the court had decreed lands to be sold: and cited the case of *Digby and Cornwallis*, and Sir *John Tuston's* case, and said necessity doth create a natural equity. Lord keeper could not tell how he could make such decree, but at the plaintiff's importunity he gave time till *Michaelmas* to attend him with precedents. 1 *Vern.* 181, 182.

6. The defendant *R. S.* anno (81) made a mortgage of the lands in question for 1000 years for 1000*l.* and interest, and confessed a judgment to another for 150*l.* and after on his marriage settled the same lands to the use of himself for life; remainder to trustees for the life of the husband to preserve contingent remainders; remainder to the wife for life; remainder to the first and other sons in tail; remainder to his own right heirs. The defendant having no issue articles to sell the same lands to the plaintiff, who brings a bill, and therein sets out these matters, and that the trustees refused to join, and the mortgagee threatened to enter, and prayed specific execution of the agreement, and that the trustees might join in the conveyance; the husband and wife by their answer set forth the settlement, that they had been married six years, and had no issue, confessed their contract with the plaintiff; and that they were ready to perform it; the trustees also set out the settlement and submitted to do as the court should direct, being indemnified. For the plaintiff it was insisted, that the settlement being only of an equity of redemption, the mortgagee was not bound thereby, but might enter and also foreclose, which would bind even the issue. And that the husband and wife not being able to redeem, the sale was necessary, also that the benefit of redemption would be lost, as well to the husband and wife as to the issue, if there should be any. His honour decreed, the trustees to join in the sale and to be indemnified; the settlement being only of an equity of redemption, and the wife being in court and examined, whether she freely consented or not? 2 *Vern.* 303, 304.

7. The motion was for a mandatory writ to the chief justice of the king's bench, to command him to sign a bill of exceptions in the case of lord *G. et al'*, who were convicted of a riot in *London*, and precedents were produced where a writ of this sort had issued out of this court, to the judge of the sheriffs court in *London*. Motion denied; for the precedent produced was to an inferior court; and he would not presume but the chief justice of *England* would do what was just in the case, &c. and if they had wrong done them, they might right themselves by actions on the case. And if the court had power to grant such writ, it was discretionary, and not *de curfu*. 1 *Vern.* 175.

8. The bill was for a debt due to the plaintiff as executor; the defendant pleaded an outlawry of the plaintiff in bar, but the plea was over-ruled; the plaintiff suing *en auter droit*. 1 *Vern.* 184. *And so it is of others who are disabled to bring actions in their own rights, yet en auter droit they may sue or be sued.*

9. The custom of the manor was, that the copyholds had been usually granted by copy in fee-simple, or for life, or for years. Held by *Fenner* and *Popbam*, that an estate-tail might be of these customary lands; for that

an estate-tail might be wrought out of such lands by equity of the statute *de donis*; for otherwise there can be no estate-tail of copyhold lands; for by usage it cannot be maintained, for that no such estate was before this statute; and this is within the time of limitation, after which a usage cannot make a prescription. *Poph. 33. &c.*

10. References, 1 *Vern.* 177, 330. 2 *Rep. Chan.* 144. *Skin.* 78. *Fi. Ley* 9. b. *Co. Lit.* 6. b.

297. *Negatio destruit negationem, et ambo faciunt affirmativum.*

TWO negatives make an affirmative in grammatical construction; for *negatio destruit negationem, &c.* yet the law that principally regardeth substance, may judge otherwise according to the intention of the parties, and not according to grammatical construction; for *mala grammatica non vitiat chartam.* *Co. Lit.* 146. b.

298. *Negative cannot be proved.*

General.

1. **W**itnesses cannot testify a negative, but an affirmative. *Co. Lit.* 6. b.

What a good evidence, and the course.

2. When a trial is by witnesses, regularly the affirmative ought to be proved by two or three witnesses; as to prove a summons of the tenant, or the challenge of a juror or the like, but when the trial is by the verdict of 12 men, there the judgment is not given upon witnesses, or other kind of evidences, but upon the verdict, and upon such evidence as is given to the jury, they give their verdict. *Co. Lit.* 6. b.

The sorts of evidence.

3. *Bracton* saith there is *probatio duplex, viz. viva*, as by witnesses *viva voce*, and *mortua* by deeds, writings and instruments. *Lib.* 5. *fo.* 400.

Presumptions.

General to, and the sorts.

4. Many times juries, together with other matters, are much induced by presumptions, whereof are three sorts, (*viz.*) violent, probable and light or temerary.

Particular cases.

5. *Violenta praesumptio* is many times *plena probatio*; as if one be run through the body with a sword in an house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. *Co. Lit.* 6. b.

6. In case of a charter of feoffment, if all the witnesses to the deed be dead, as no man can keep his witnesses alive, and time weareth out all men,
then

then violent presumption, which standeth for a proof, is continual and quiet possession; for *ex diuturnitate temporis omnia praesumuntur solemniter esse acta*; also the deed may receive credit *per collationem sigillorum, scripturae, &c. et super fidem chartarum, mortuis testibus, erit ad patriam de necessitate recurrendum.* Co. Lit. 6. b.

7. The reason wherefore the warranty of the uncle, having no right to the land intailed, should bar the issue, is because the law presumeth, that he would not unnaturally disinherit his lawful heir, being of his own blood, of a right which he, the uncle, never had, but came to the nephew by another means, unless he would leave him greater advancement. *Nemo praesumitur alienam posteritatem suae praetulisse.* And in this case the law will admit no proof against that which the law presumeth, and it is the same of all other collateral warranties; and that because of the presumption, that no man is to be presumed to do any thing against nature. See Co. Lit. 373. a.

8. So if a rent be behind for 20 years, and the lord make acquittance for the last that is due, all the rest are presumed to be paid, and the law will admit no proof against it, &c. Co. Lit. 373. a.

9. See rules, *Ex diuturnitate temporis, &c. Nemo praesumitur alienam posteritatem, &c.* Law will admit no proof against that which the law presumeth.

299. *Neminem oportet esse sapientiores legibus.*

General.

1. **L**AW, legal reason, or the reason of the law, *summa est ratio*, and particularly of the laws of this realm, as lord Coke justly saith, the old rule is verified, *neminem oportet esse sapientiores*, &c. for it is the very perfection of reason. See Co. Lit. 97. b.

Particular.

2. It was resolved that forasmuch as in the case at bar, a *ca. sa.* was awarded against the countess by the court of common bench, that the sheriff or his officer, by his warrant, might without any offence execute it; for they are not to dispute the authority of the court, but to execute its writs directed to them; and indeed to this they are sworn, and therefore thereto bound by law and conscience; and though it appear in the case, that she was a countess, against whom it lieth not, *et ignorantia juris non excusat*, especially sheriffs, and other like ministers of law and justice; yet as a *ca. sa.* lieth in some cases, as in cases of contempt, &c. against them; therefore it was resolved, that the sheriff and his ministers or officers ought not to examine the judicial acts of the court, but to execute the writ, as is Dy. 60. If a *capias* or *exigent* come to the sheriff, against a duke, an earl, &c. where none lieth against them, yet they are to serve it, and not to argue or dispute the validity of it. 6 Co. 54. a. See Doct. & Stud.

300. *Nemo debet bis puniri pro uno delicto.*

General and rules.

1. **O**NE convicted of manslaughter being allowed his clergy, it is a good bar in an appeal of murder. 4 Co. 45. b.
2. And though the law gives an appeal, as a means to be justly revenged for the death of the husband, &c. yet it ought to be instantly pursued; and as it threatens death to the party, it ought to be in all points strictly pursued. *Yelv.* 205. *Ha. Ple. Cro.* 190, 247. *Tri. per Pais* 454. *Co. Lit.* 287. *Fitzb. Abr.* 258.
3. If one be convicted either by verdict or confession, upon an insufficient indictment, and no judgment is upon it given, he may after be indicted and arraigned; for that his life was never in jeopardy, and the law had not its end. 4 Co. 45. a. 47. a.

Particular cases.

4. It was resolved in the principal case, that if the count had been sufficient, then being convicted at the suit of the party, he should not after be impeached at the suit of the king; but the count was insufficient, and so he was discharged. 4 Co. 39. b. 40. a.
5. *Wetherel* brought an appeal of murder against *Darby*. The defendant pleaded *non cul*, and was found guilty of homicide, and had his clergy; and after was indicted of murder, and was arraigned at the suit of the queen, and pleaded the former conviction, and appeal at the suit of the party. Adjudged a good bar. 4 Co. 40. a.
6. *Hudson* brought an appeal of maihem against *Lee*, and counted that the defendant the eighth day of *January*, anno 28 *Eliz.* feloniously maimed him in his left hand, &c. The defendant pleaded, that before the appeal brought, the plaintiff brought trespass in C. B. of assault, battery and wounding, against the defendant the same eighth day of *January*, &c. to which the defendant pleaded *non cul*, and was found guilty, and damages assessed to 200 marks for the assault, battery and wounding, and 10s. costs, and judgment upon it given, and satisfaction acknowledged before the appeal brought, and avers that the battery and wounding in the action of trespass, and the said maim whereof the said appeal is now brought, were one and the same and not divers; and it was moved that this was no bar, for two reasons. 1st, Because the maihem is of an higher nature than the action of trespass; for in the appeal it is, that the defendant felonice him maimed; and the rule of law is, that recovery or bar in one action is a good bar in another, of either equal or of an inferior nature, but not in action of a higher nature; as recovery or bar in one assise is a good bar in another assise, but not in a mordancestor, nor is a recovery or bar in a mordancestor a good bar to a writ of right; nor is an action brought for goods carried away, any bar in an appeal of robbery, for the appeal of robbery is of an higher nature than the other. And this was moved, admitting the appeal was brought for the same matter; but it was moved that the appeal was brought for the maim only, and therefore it is said felony, which may not be applied to trespass; and the action of trespass for the battery and wounding doth not concern the maim; and therefore it was agreed 22 *Ass. pl.* 82. That after

the plaintiff in appeal had recovered for the maihem, he might have trespass for the battery, whereby it appears that the appeal meddles with the maihem only. But it was resolved *per totam Curiam*, That the bar was good; for in every case when the plaintiff for a tort or injury is only to recover damages, he shall never be twice satisfied for one and the same matter or thing, *juxta illud; nemo debet bis puniri pro uno delicto, et Deus non agit bis in ipsum*; and in both these actions, of appeal and trespass, the plaintiff may recover only damages: and it appeared to the court, by the defendant's bar, which the plaintiff by his demurrer had confessed, that he, in the very action of trespass which he had brought for the battery and wounding, had recovered damages for the maim; for this clear reason, that wounding includes maihem and more. And the defendant hath averred that the wounding in the action of trespass and the maihem in the appeal were the same; so that though the appeal of maim is an higher action; yet soasmuch as in it he shall only recover damages, and damages he hath actually recovered in the action of trespass; therefore resolved, that the bar, in the case at bar, was good. And *Wray* chief justice, said, That so it was lately adjudged in the same court, which record he had seen, and it agreed with the book 41 *Aff.* 16. and the book 2 *R.* 3. 14. is good law; for in the appeal of robbery the plaintiff shall have judgment against the defendant for his life, and not for damages. 4 *Co.* 43. a. b.

7. See rule, *Usury odious in law.*

301. *Nemo est haeres viventis.*

Heir.

Who is, how made, and from whence named.

1. **H** *HEIR*, *haeres*, in the legal understanding of the common law, implieth that he is *ex justis nuptiis procreatus*; for *haeres legitimus est, quem nuptiae demonstrant*, and is he to whom lands, tenements or hereditaments, by the act of God and right of blood do descend, of some estate of inheritance; for *solus Deus haeredem facere potest, non homo; dicuntur autem haereditas et haeres ab haerendo, quod est arte insidendo; nam qui haeres est haeret; vel dicitur ab haerendo, quia haereditas sibi haeret, licet nonnulli haeredem dictum velint quod haeres fuit, hoc est dominus terrarum, &c. quae ad eum perveniunt, &c.* *Co. Lit.* 7. b.

Rules.

2. One cannot be heir till after the death of his ancestor; in the mean time, he is called *haeres apparens*, heir apparent. *Co. Lit.* 8. a.

3. And this also is a positive rule, That a man cannot raise a fee-simple to his own right heirs by the name of heirs, as a purchase, neither by conveyance of lands, nor by use, nor by devise. Nay more, if a man devise lands to a person that is next heir, and his heirs, the devise is void, and it worketh by descent, &c. *Hob.* 30. 31.

Particular cases.

4. *Francis Archer*, seised of lands in fee, held in socage, by his will in writing devised the same to *Robert Archer* the father, for his life; and after to the next heir male of *Robert*; and to the heirs male of the body of such next heir male: *Robert* had issue *John*, *Francis* died, *Robert* infeoffed *Kent*, with warranty, upon which *John* entered; *Kent* re-entered, and after *John* died, &c. and int' al' it was agreed by *Anderson*, *Walmsley*, et al' the court, that *Robert* had but an estate for life; for that he had an express estate for life devised to him, and the remainder is limited to the next heir male of *Robert* in the singular number, and the right heir male of *Robert* may not enter for the forfeiture, in the life of *Robert*; for he cannot be heir so long as *Robert* lives, &c. 1 Co. 66. b. Cro. Eliz. 453. S. C.

5. References, Co. Lit. 99. b. 2 Vern. 249, 444, 616. Gilb. 7, 41, 116, 131, 138, &c. Prec. Chan. 3, 475. Co. Lit. 299. b. Eq. Abr. 107. 1 Vern. 282, 172, 14, 410, 411. Nels. 313, 128, 257. Pre. Chan. 53, 147. 1 Vern. 93, 407, 453, 460, 469. 2 Vern. 104, 188, 189, 341, 357. 3 Mod. 45. 1 Vern. 234, 282, 172, 419, 429, 471, 469. Nels. 282, 97, 166, 167, 138, 201, 380, 164, 272, 175, 176. Prec. Chan. 2, 381, 439, 452, 443, 461, 544. Hob. 31. 1 Leon. 70. 1 Vent. 334. 4 Mod. 255. and case *Beaumont and Long*, Co. Lit. 26. b. 164. *Cowden and Clerk's case* in Hob. 29. *Pybus and Mitford*, Dy. 171. *And Shelley's case*, 2 Leon. 23, 27. Cro. Eliz. 108. Lit. sect. 30. Cro. Ca. 24. 1 Mod. 226. 2 Mod. 207. Prec. Chan. 463. Co. Lit. 3. a. Year book 9 H. 6. 23, 24. 11 H. 6. 12. 37 H. 8. Bro. tit. De donis sect. 61. Lit. sect. 352. Prec. Chan. 461, &c. 54, &c. 544, 57, 143, 162, 196, 207, 213, 267, 475, 278, 31, 32, 319, 87. Nels. 161, 267. 2 Vern. 617.

302. *Nemo plus juris ad alium transferre potest, quam ipse habet.*

1. **A** Release or confirmation, made by him who had no right at the time, is void, though a right come to him after; unless made with warranty, and then the warranty shall bar him to all right which may come to him after. Doct. & Stud. lib. 1. cap. 8.

2. The guardianship of an infant is not assignable over; being but a bare power or trust. 2 Mod. Ca. 40, 42. Vaugh. 180. 2 Rep. Chan. 237.

3. Error on a judgment in *C. B.* in ejectment, wherein a special judgment was found to this effect; *H.* seised in fee, deviseth to his wife for life, and then to be at her disposal to any of her children who shall be then living. *H.* dies, leaving a son and a daughter and his wife; who then enters and married a second husband, and he and she by lease and release convey the lands to *A.* and his heirs, to the use of the wife for life, sans impeachment of waste; remainder to her daughter and the heirs of her body; remainder to the son and his heirs, with a power to revoke and limit new uses: The first question was, Whether the wife had an estate in fee, or only an estate for life, with power to dispose of the inheritance? And the

court

court held this to be only an estate for life, with a power to dispose of the inheritance. *Et per Parker*, lord chief justice, The difference is, where a power is given with a particular limitation and description of estate, and where generally: as to executors to sell or give; for *he that can give or sell an estate in fee, must have an estate in fee.* 2. The question was, Whether this power could be construed as a power appendant to the estate for life, so as by the destroying of that, it might be destroyed or extinguished; or a collateral one? And *Powell* justice said, this was not a power appendant or appurtenant, nor in the nature of an emolument to the estate, like a lease for life, with a power to make a lease for 21 years; for that effects the estate for life and is concurrent with it, and has its being and continuance, at least for some part, out of it; but the power here ariseth out of the estate, and has its effect upon another interest; so that the estate for life is perfect without it, and no ways altered or affected by the execution of it. *Et adjournatur*, and afterwards at another day, lord chief justice *Parker*, (afterwards earl of Macclesfield and lord high chancellor) delivered the opinion of the court, that this was only an estate for life, and that the disposing power was a distinct gift; because the estate given is express and certain, and the power comes in by way of addition; and that this differs from the other cases, which are general and indefinite, viz. a devise to *J.S.* and that he shall sell, or a devise to *J.S.* to sell, &c. in these cases, because the party is impowered to convey a fee, he is construed to have one; he having no express estate divided from the power; but here the power is a separate gift distinguished from the estate, and the estate given is a certain and express estate. *Salk.* 239, 240.

4. References, 4 Co. 24. b. *Cart.* 232.

5. See rules, *He who can sell or give an estate in fee must have an estate in fee. Quod per me non possum nec per alium.*

303. *Nemo potest habere duas militias, nec duas dignitates.*

1. **A** Cardinalship at Rome made a parsonage at Durham void. *Pal.* 459. A cardinalship makes void a bishoprick in England. 4 *Inft.* 357. A bishop taking another bishoprick, the first is void. *Palm.* 462, 464. *Vaugh.* 21. A parson or dean taking a bishoprick in Ireland makes the first church void; *nemo potest habere*, &c. for it is impossible a man should be in two places at the same time, &c. *Pal.* 458, 459, 469. *Dav.* 21. A prebendary made a dean, the prebend void. 5 *E.* 2. *Breve* 800. accordant. *Pal.* 461. One having a benefice with cure to the value of 10l. or more, receives another, the first is void. *Stat.* 21 *H.* 8. *Dy.* 255, 237. *Vaugh.* 21. *Hob.* 166, 168. *Dy.* last case. Parson made a bishop, voids the parsonage. *Palm.* 345. 11 *H.* 4. 60 and 74. *Dy.* 159. 4 *H.* 4. 2. 32 *H.* 6. 5 *E.* 4. 19, 24. *Pal.* 346, 347, 348, 349. *Dy.* 347. 4 *Co.* 75 and 78. 6 *Co.* 29. *Dy.* 377. *Co. Ent.* 368. *Cro. Ca.* 357. *Case Archbishop Armagh and Attorney General*, 2 *Ju. Eccl.* 414.

2. See rule, *Clerici non ponantur in officio.*

304. *Nemo praesumitur alienam posteritatem suae prae-
tulisse.*

SEE rules, *Negative cannot be proved.* *Presumption general to, and the
sorts, case 7.*

305. *Nemo tenetur divinare.*

1. **I**T was resolved if the lord, in case of uncertain fines, assess a reason-
able fine and require the copyholder to pay it, he is not bound to pay it
presently; because he could not tell what fine the lord would assess; *et*
nemo tenetur divinare; wherefore he could not provide a certain sum; and
therefore he must have a convenient time to pay it, if the lord himself li-
mit no certain time for it; but otherwise it is of fines certain. 4 Co. 23. b.
24. a. 27. b. 28. a.

2. And this rule may extend to the king himself, as to matter of fact,
though he is not to be supposed ignorant of the law; for that he is the
head of the law and fountain of justice. Plow. Com. 501. b. 502. a. b.
503. 11 Co. 11. a. b. 3 Co. 4. b. Hob. 224. *Introduction to Ju. Eccl.*
last part.

3. See rules, *Ignorantia facti excusat.* *King not to be supposed ignorant
of the law.*

306. *Nemo tenetur seipsum prodere.*

1. **B**ILL in Scacc' to discover on what consideration a bond was given,
which had been assigned *al roy* as a debt in aid. The court were
of opinion that a man was not bound to discover the consideration of a
bond, which implies in itself a consideration. And so baron Atkins said
it had been ruled in chancery. Hard. 200, 201.

2. A bill was by the attorney general against the defendant, to discover
his real and personal estate, and what secret and fraudulent gifts and deeds
he had made and executed, he being outlawed, whereby all his goods and
the profits of his real estate were forfeited. The defendant demurred, *quia*
nemo tenetur prodere seipsum, and to discover his estate upon forfeiture; the
demurrer was over-ruled, and the defendant ordered to answer; because
the king is intitled by course of law, and the outlawry is in the nature of a
gift *al roy*, or a judgment for him; and a common person in like case might
have a bill for discovery to enable him to take out execution; *quod nota*
says the serjeant. Hard. 22.

3. The bill was to discover goods imported contrary to the new act of
navigation, for which the defendant ought to pay double customs. It was
likewise alledged that the attorney general would not prosecute for the for-
feiture, but the duties only. Defendant demurred, because a penalty ensued;
the goods being forfeited by the act of tonnage and poundage; and after dis-
covery had, the attorney general may relinquish his bill, and begin *de novo* for
the penalty, and is not bound by the allegation of the bill. To this it was
answered, That the attorney general waiving the forfeiture, might sue for
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the duty by bill of discovery; as in the case of tithes, where the plaintiff only requires single value: and that after the attorney general had informed upon the penal law, none else could; and the court inclined to this opinion. *Sed adjournatur. Hard. 137. See Gilb. 187.*

4. The bill was in the *English* exchequer, and charged that the plaintiff in *May* 1658 became incumbent of the church of *Bersted* in the county of *Kent*, and that the defendant *June* 1658 and 1659, by colour of an order of sequestration made by the committee in the county of *Southampton*, as they pretended, had seised divers tithes of several parishioners within the plaintiff's parish, and which tithes were due to the plaintiff. To discover the particulars and value, and to have them paid to the plaintiff was the end of the bill; whereto the defendant demurred, as a matter determinable at law, and a criminal matter; but the court put the defendant to answer, because it is matter of discovery: as in case where a man by colour of title enters into the house or lands, and possesses himself of the goods and profits. It may be impossible for the plaintiff to discover the particulars without such bill, nor is it a charge by way of trespass, but under a colour of title. So where a will is proved and administration revoked, such a bill is necessary and usual for the goods, and yet there was in strictness of law a trespass; so here. *Hard. 182, 183.*

5. *Spendelow*, the present parson, sues Sir *William Smith*, executor of *Smith* the last incumbent, for dilapidations, in the arches; there was, *inter alia*, a question about a lease for years, which was alledged to be taken by Sir *William* in his own name, but covinously in trust, and for the use of the said *Smith* the said late parson; and hereupon they would put Sir *William* to his oath, to answer concerning the covin; whereupon the court granted the prohibition *quoad* examining him upon oath concerning the covin; for though the original cause belong to their cognizance, yet the covin and fraud is criminal, and the avowing of it to be *bona fide* is punishable, both in the star-chamber, and by the penal law of fraudulent gifts, and therefore not to be extorted out of him by oath; also the exposition of the statute 13 *Eliz. cap. 10.* of dilapidations, and what shall be covin, or not within the law, rests not in them to judge, but in the courts of common law. *Hob. 84.*

6. In all sentences for divorce and separation only a *mensa et thoro*, there is to be a restraint inserted in the sentence, that the parties shall live chastely and continently, and that they will not, during each other's life, contract matrimony with any other person; and for the better observation of this last clause, the said sentence of divorce shall not be pronounced until the party or parties requiring the same have given good and sufficient caution and security into the court, that they will not any ways break or trespass the said restraint or prohibition. *Canon 107.* Yet the ecclesiastical court may not examine the party on oath, whether he or she hath contracted matrimony or not, &c. for *nemo tenetur seipsum prodere.* *Clifford* and *Huntley's* case, *Ro. Abr. Prohibition (T.) case 6. 2 Ju. Eccl. 31, 32.*

7. Bill was for defendant to discover what estate he had or claimed in such premises, and whether they were in mortgage, and whether there was any power of redemption. The defendant pleaded his being an absolute purchaser for valuable consideration, and that some years after a fine was levied to him of them, and that he had no notice of the plaintiff's title.

Plea allowed, though he did not shew at what time, or for what consideration. And the chief baron said, that so it had been held in *Sherley and Fagg's case*, lately in chancery. *Hard. Day versus Cornudel.*

8. The bill was to discover an antient deed of intail supposed to be in the defendant's hands, charging that he had perused it; and in discourse had acknowledged it, &c. The defendant saith by plea, that he was a counsellor with *A. B.* and that on a reference between the parties, it was agreed that nothing that passed thus should be made use of on either side, or be disclosed. The lord chancellor ordered that what the defendant knew only as a counsellor, or under such contract of silence, he should not be put to answer. 1 *Chan. Ca.* 277.

9. *Snelling* had a judgment against *Sidenham* of 1200 *l.* for payment of 500 *l.* *Squibb* purchased of *Sidenham* for a valuable consideration without notice; *Snelling* sues *Squibb* to discover lands subject, &c. that he might extend, he not knowing the place nor who tenants. *Squibb* pleaded his purchase for a valuable consideration without notice. The lord chancellor allowed the plea, and said that *Squibb* ought not to be compelled to discover what lands were liable. 2 *Chan. Ca.* 47, 48.

10. The assignee of a commission of bankruptcy against *Portman* exhibited his bill against the defendant, to discover lands, &c. which were the bankrupt's at the time of breaking. *Hutchins* (afterwards lord commissioner of the great seal) for the defendant, pleaded that he was a purchaser for a full and valuable consideration, without notice of any act of bankruptcy, or that *Portman* was a bankrupt, or of any commission, and refused to make discovery. And the plea was allowed by lord North lord keeper. 2 *Ch. Ca.* 136.

11. The plaintiff by his bill charged that on the mortgage made by *W.* to *A.* there was a trust declared for the benefit of the plaintiff, but *A.* having since conveyed to the other defendant *D.* he refused to discover the trust. The defendant *D.* by answer said that on the said mortgage there was no trust declared for the benefit of the plaintiff, whereto the plaintiff replied. And the *quaere* at the hearing was, Whether the defendant *D.* should be obliged to produce the deed or not? Lord keeper: I will not oblige him to produce it; by this method all purchasers may be blown up. 2 *Vern.* 463. *Tamen quaere*, says *The Reporter.*

12. References, *Gilb.* 187. *Ro. Ab. (T.) Ca.* 1. 4. 5. 6. 65. 4 *Mod.* 306. *Hob.* 84. 2 *Keb.* 352. *Hard.* 172, 173, 137 to 147. *Co. Lit.* 247. *a. b.* *Register* 228. *b.* *Fitzb. Nat. Brev.* 202. 4 *Co.* 123. *b.* *Hard.* 143. *Co. Lit.* 2. *b.* *Nels.* 135. 2 *Vern.* 414. 1 *Rep. Chan.* 40. 2 *Vol.* 221. *Gilb.* 101. *Mo.* 906. 4 *Leon. Ca.* 261. *Ray.* 88, 221. 1 *Vern.* 27, 95, 107, 110, 136, 204, 208, 399, 407, 484. 2 *Ju. Eccl.* 31.

13. See rule, *Purchaser without notice, &c.*

307. *Nihil in lege intolerabilius est eandem rem diverso jure censi.*

WHERE the courts are divided and hold different opinions, as in the principal case, for the honour of the law, and for the repose of the subject, in the appeasing such differences of opinions, *quia nihil in lege intolerabilius est eandem rem diverso jure censi*, the case was publickly argued before all the judges of England, &c. 4 Co. 93. a.

308. *Nihil magis justum est, quam quod necessarium est.*

1. IMposts or impositions are the third kind of duties payable for merchandise, and are sometimes rated and assessed by parliament, and then they are in nature of subsidies; and sometimes they are imposed by prerogative royal, for supporting the necessary charges of the crown, and then *nihil magis justum est, quam quod necessarium est*. The imposts upon wines in this realm was first assessed by parliament, and limited to be paid for a certain term of years, which being expired, is continued by prerogative. Dav. 12. a. Vide etiam 22. b.

2. See rules, *Natura appetit perfectum. Necessitas facit illud licitum, &c. Necessitas legum vincula irridet. Necessitas vincit legem. Necessity creates equity.*

309. *Nihil quod est contra rationem est licitum.*

1. REason is the life of the law, nay the common law itself is nothing but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason; for *nemo nascitur artifex*, and this legal reason *est summa ratio*, &c. Co. Lit. 97. b. See Doct. & Stud.

2. See rules, *Law is the perfection of reason. Ratio est radius divini luminis.*

310. *Nihil quod est inconveniens est licitum.*

AN argument drawn from inconvenience is forcible in law; *nihil quod est inconveniens est licitum*, and the law which is the perfection of reason, cannot suffer any thing that is inconvenient. Co. Lit. 97. a. Doct. & Stud.

311. *Nihil tam conveniens est naturali aequitati, quam unumquodque dissolvi eo ligamine quo ligatum est.*

1. CUstom ought to have continuance *sans* interruption of time, whereof, &c. for if it be discontinued within memory, the custom is gone; as if a copyhold be leased by the lord of the manor for life or years, according to the custom of the common law, it shall never more be demised

as a copyhold according to the custom. 18 H. 8. Dy. 30. b. *Consuetudo semel reprobata non potest amplius induci*; for as continuance maketh the custom, so discontinuance may destroy it. *Nibil tam inconueniens est*, &c. Da. 33. b. See 2 Ju. Eccl. and quaere; for there, tho' the Modus had been varied by subsequent composition for 66 years or more; and had been once actually paid in kind, yet that did not destroy it. 2 Ju. Eccl. 122. See 1 Ju. Eccl. 449, &c. The case at length, where his lordship lord chancellor observed, there was strong evidence of the Modus or custom; and therefore, though there had been a composition and such variation, &c. yet all that ought not to toll the Modus so well proved and established; for thus to reason, I submit it, would be to give an incroaching priest advantage of his own wrong, against an honest abused parishioner, against all the rules of known honesty and common justice; for all Modus's, as other customs and compositions, are to be presumed founded either in immemorial and reasonable usage, or else in a well grounded compact and agreement; and if notwithstanding such usage, or agreement had for good and valuable consideration, a man shall be compelled to pay tithes, where he ought to be excused therefrom on payment of such Modus or composition; and that meerly because through weakness, or ignorance of his exemption from tithes in kind, he hath submitted, under those disadvantages, to an alteration in payment, or to tithes in kind, would be to give the oppressor advantage of his own wrong and of his parishioners ignorance or weakness; whereas the rule is, that no man is to be hurt by his ignorance of his right. As to the case of the lord and copyholder, I submit it, that case stands upon a very different reason, the lord there, with full knowledge of his privilege, agrees to destroy it: which is not the latter case by any means; therefore these cases may well receive these different determinations. Besides, a: I conceive, these base tenures are not countenanced in law, as being too plain marks of slavery or servitude, in a free and trading nation; as the same tends to enervate the peoples industry, and reduce their courage, to the hurt both of the prince and the public weal.

2. References, Cro. Ja. 5, 6. 2 Ro. 97. Jenk. 166.

312. No construction can be too liberal to make parsons reside, &c.

General.

Statute.

1. **T**HE statute 21 H. 8. is to be taken strictly against pluralities. 4 Co. 90. b.

Canons.

2. No licence or dispensation for keeping more benefices with cure than one, shall be granted to any, but to such as in the canon are for that purpose mentioned; wherein is provided, that such pluralist be, by good and sufficient caution, bound to make his *personal residence*, in each of his benefices, for some reasonable time in every year, &c. as may be collected from Canon 41. and every beneficed man, licenced by the law of this realm, upon urgent occasion of his service, not to reside upon his benefice,

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shall

shall cause his cure to be supplied by a curate that is a sufficient and licenced preacher, if the worth of the benefice will bear it. But whosoever hath two benefices, shall maintain a preacher licenced, in the benefice where he doth not reside, except he preach himself at both of them usually, as is the sense of the 47th Canon. See 2 Ju. Eccl. 451. And further by the canons of the church even those excused residence, are by good and sufficient caution, to be bound to residence **personal**, in each of their livings, for some reasonable time in every year, so as they are not, in any case, to be altogether non-resident, but only on **urgent occasions**; much less are they for any whim or humour of their own to neglect their personal cure; a multo fortiori they are not to turn renegado's, and leave their people to wander, or be devoured of the destroyer. But here I am aware of an objection, namely, that these canons interfere with the statute law of dispensations in this case. However that may be, is the business of non-residents, rather than mine; to consider, who have their own consciences to satisfy and quiet in this matter. But granting the canons, as being subsequent in time, to the statute intended, as well as weaker in power, as being made by so much a meaner authority, as convocation is than the grand counsel assembled in parliament; and though it be true these canons have never been assented to, or received by the people, and therefore no lien upon them, nor perhaps upon the clergy themselves *stricto jure*; as this may be considered as a temporal indulgence; yet I must so far give way to their authority over ecclesiastics, as to admit, that as these canons were made in public convocation by and with the assent and consent of all the clergy, and confirmed, at their humble and earnest intreaty, by the royal assent, they may be binding on the clergy themselves, and that the rather for these reasons, 1st, For that the good of the church requires residence, and therefore, in her sense, no construction can be too liberal to make parsons reside. Summa est ratio quae pro religione facit. And by the antient canons un home ne puisset aver forsque une benefice, nisi en case de necessitie ou utilitie del' ecclesie. Et dispensatio est relaxatio juris, admitting that to be done which the law had prohibited before. So dispensatio est vulnus, quod vulnerat jus commune, say the canonists; and as they also say, commenda est materia odiosa et restringibilis; and according to the opinion of a good and pious bishop of old, a **dissenter from the moderns in some countries**, this practice of pluralities and non-residence or absence from their cure of souls in pastors was looked upon, in the then old fashioned sense of the church, as a spiritual adultery. Absit, says our good old man, ut cum sponsa habeam concubinam, &c. 2. For that the common law requires it. 1. For the discharge of the cure, that the parson being always on the spot, be always ready, when ever any of his spiritual offices call him. 2. For hospitality, alms-deeds, &c. 3. For keeping a good correspondence with his parishioners, &c. 4. For maintenance of the parsonage house, &c. for himself and successors. 5. For good example; the parson being bound to preach in his life as well as doctrine, and for frequent visitation and instruction of the ignorant and reprobate, &c. 3. For that example to his brethren the neighbouring clergy requires it, &c. 4. For that this is a duty he owes in common justice, as well as by the laws of holy church, to his patron whose inheritance the advowson is, and also to his successor, who both suffer in dilapidations. And 5. and lastly, inter al', for that he hath in most sacred manner, and by most solemn and repeated obligations bound himself thereto, &c. &c. &c.

Particular cases.

3. *Michaelmas* 10 H. 6. fo. 8. J. S. brought debt against John, rector of T. in C. B. The defendant said, that he was, before the day of the writ purchased, demurrant and conversant at B. in the county of N. *Sed non allocatur*; for a parson shall be intended, by the law, resident upon his benefice, for the cure of souls which he hath there the charge of; for a parson who hath cure of souls, and is non-resident, *non est dispensator, sed dissipator, non speculator sed spiculator*; and therefore no such thing as non-residence shall be ever presumed. 11 Co. 70. b.

4. Between Goodale, informer *tam pro se*, &c. upon the statute 21 H. 8. of non-residence, and Butler, parson of Downham in Norfolk, resolved on special verdict, That the parson ought to reside on his living, viz. in the parsonage house, and not in any other, though such other be within the parish; for the statute means not only for serving the cure, and for hospitality, but also for the maintenance of the house, and habitation of the parson, and that not only for himself, but also for his successors, that they also might maintain hospitality there, &c. though it was agreed that lawful imprisonment, *without covin*, is a good excuse for non-residence, or if there be no parsonage house; (*but that also, I hold, must be understood, without covin*; for if there be a fund to provide such an house, or there be an house, though never so poor an one, the neglect of the parson to apply the fund, or his pretence that it is not suitable to his rank, is even no legal excuse, however he may deceive his own conscience. As in the first case, he is cheating God and charity, that he may be more at leisure to serve the devil; and as to the last, that as he knew what the house was when he took his living, and always was at liberty to resign, he ought either to suit himself to it, or leave it to, perhaps, a better man, who will); for *impotentia excusat legem*, and these cases are excepted out of the act by construction of law. Note; It was held in the exchequer, Trin. 39 Eliz. That sickness *sans fraud* is also a good excuse, so the patient remove, by advice of his physicians *bona fide*, for better air, and recovery of his health. 6 Co. 21. b.

5. A bill was brought for discovery of tithes by a lessee of a parson. The defendant pleads 13 Eliz. cap. 20. against non-residence, in bar. Agreed by lord chief baron Gilbert, Mr. baron Price, and Mr. baron Page, that the plea was good; and that no construction could be too liberal to make parsons reside, and take care of their parishes. *Gilb. Quilter and Mussendine's case*.

6. References, 4 Co. 117. b. 118. a. Mo. 540, 448.

7. *Vide rule, Quando duo jura concurrant in una, &c. Impotentia excusat legem.*

313. *No distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty.*

SEE rule, *Id certum est quod certum reddi potest.*

314. *Nomen non sufficit, si res non sit de jure, aut de facto.*

THE pope could not found or incorporate a college within this realm, nor assign, nor licence others to assign temporal livings to it; but this ought to be done by the king and no other. *Nomen non sufficit, si res non sit de jure, aut de facto.* 4 Co. 107. b. Vide 1 Ju. Eccl. under tit. The pope an usurper throughout.

315. *No man can charge his heir but as part of himself.*

1. **R**Eference, see *Hob.* 131.
2. Rule, *Haeres est eadem persona cum antecessore.*

316. *None shall take by deed but parties, unless in remainder.**General.*

1. **A**NY stranger to an indenture may take by way of remainder, but he cannot take a present estate in possession if he be a stranger. *Co. Lit.* 231.

Particular cases.

2. *A.* seised of lands in fee, covenants with *B.* in consideration that *B.* marries his daughter, that from the time of such marriage he will stand seised to the use of himself for life, and after to the use of *C.* and the heirs of his body begotten, and after to the use of *D.* and to the heirs of his body begotten, and afterwards to the use of *B.* and the said daughter of the said *A.* and to the heirs of their bodies begotten, there, after the said marriage had, the said *A.* shall be seised by the common law, to the use of himself for life, then to the use of *C.* in tail, then to the use of *D.* in tail, and after those estates to the use of *B.* and his said wife, daughter of the said *A.* in tail, according to the limitation; and yet he had no consideration for the said *C.* and *D.* having the uses in tail; for the marriage of *B.* is a private and several consideration for them to have their estate-tail, but it is no consideration to *C.* and *D.* who are strangers; but though it be not, yet forasmuch as the estate to *B.* and his wife is limited after the death of *A.* and after *C.* and *D.*'s death *sans* issue, and not before, it follows, that *B.* and his wife ought to take in such form, and not otherwise, and this is in remainder; and this remainder ought to be in them immediately after the marriage had; for *A.* hath covenanted, that from the time of the marriage he would stand seised to the uses, &c. and therefore, for the necessity, the uses shall vest in *C.* and *D.* because of the remainder to *B.* and his wife, to whose estate theirs was to precede: but if the limitations to *C.* and *D.* had been after the estate to *B.* and his wife, or if the covenant had been, that *A.* should stand seised to the use of himself for life, and after to the use of *B.* and his wife in tail, and then to the use of *C.* in tail, and after to the use of *D.* in tail, there the remainder to *C.* and *D.* should be void; for there was no consideration to make

make them good; for the marriage between *B.* and his wife is only a consideration for the estate of *B.* and his wife; for the marriage only concerns and touches their single persons, which can be no consideration to a stranger: but money might be a good consideration for all the estates, whilst the consideration of marriage is, as hath been said, singular to their persons who are married, and to the father whose daughter is preferred in marriage, and is no consideration to a stranger. *Plow. Com.* 307. *b.*

3. *Thomas lord Paget*, being seised of the manors of *B. L. &c.* in *Com. Stafford*, by deed indented 10 Oct. 20 *Eliz.* covenanted with *Farmer, Esq;* and others, that in consideration of discharging his funeral, payment of his debts and legacies, out of the profits of his lands, and for the advancement of his son, brother and others *de son sanke*, he and his heirs should stand seised of the said manors, to the use of *Farmer, &c.* for life of lord *Paget*, and after his death to the use of *Ch. Paget* and others for 24 years, and after the expiration or end of that term, then to the use of *William Paget* his son in tail, with divers remainders over; after lord *Paget* was attaint of treason; adjudged that the term to *Ch.* was void; for that it wanted good consideration; for that *Ch.* and the others were strangers to the consideration; but if he had made them executors, so that they had been chargeable to the payment of the debts and legacies, and so privies to the consideration, then the consideration had been good. But the doubt of the case was, tho' the term was void, yet forasmuch as the use to *Will. Paget* was to be raised by covenant out of the estate of the covenantor, and not by transmutation of estate, if the use shall arise and vest in *William* till the 24 years expired, by effluence of time? For in the same case it was said by Sir *Roger Manwood*, lord chief baron, that if a man make a feoffment in fee, to the use of *A.* for life, and after to the use of *B.* for life, and after to the use of *C.* in fee, in this case if *A.* refuse, *B.* shall take presently; for the feoffor, by his feoffment, hath given all his estate out of him, and all the uses are created out of it, as out of a root; and therefore so long as any of the uses may take effect, the feoffor shall have no meddling with the land; but in case of a covenant to raise an use, there the consideration, which is the cause that raiseth each several use, is several, and all the uses arise and grow out of the estate of the covenantor; and therefore if one refuse, the next in remainder may not take presently, but the covenantor shall retain, &c. It was adjudged in the principal case, that lord *Paget* himself had an estate for life; and it was also agreed that though the term was void *ab initio*, yet if the covenant had been, and after the end or expiration of the said 24 years, that then he should stand seised to the use of his son *ut supra*, that his son should not have it till the years incurred; for though the term was void, yet the estate of the son, by express limitation, did not commence till the 24 years expired; but forasmuch as the words of the covenant were, (after the expiration or end of the said term of 24 years) and the term imports in itself an estate and interest in the land; therefore the term being void, the estate of the son shall commence presently; and thereupon *William Paget* had by the rule of the court an *amoveas manum*. 1 Co. 154.

4. References, 1 *Vent.* 380. *Cro. Eliz.* 10, 56, 905. *Salk.* 214. 2 *Lev.* 74. 3 *Lev.* 139. *Lutw.* 305. 2 *Inst.* 673. 2 Co. 51. *Hob.* 313. *Dy.* 109, 126. *An.* 258. *Hut.* 88. *Car.* 76. *Poph.* 182. 3 *Keb.* 115. *Mod. Ca.* 115.

317. *None to be judge in his own cause.*

General.

1. **T**HE king may not grant to a man to be judge in his own cause, or to be his own judge. *Da. 75. a.*

2. One may not sue in the chancery of *Chester* for a thing which in interest concerns the chancellor there; for that he may not be his own judge; therefore in this case he ought to sue in the chancery of *England*; for otherwise there should be a failure of right. *Ro. Abr. 374.*

Three things are to be help'd in conscience, fraud, accident and things of confidence. *Ro. Ab. 374.*

Particular.

3. In chancery between Sir *John Egerton* and the earl of *Derby*, chamberlain of *Chester*, and others, for a farm in that county, Resolved by the lord chancellor, chief justice of *England*, master of the rolls, *Dodderidge*, and *Winch*, justices, 1st, *That the chamberlain of Chester, being to be judge of equity, cannot decree any thing wherein himself is party; for he cannot be judge in propria causa; but where he is party, the suit shall be heard in chancery, coram domino rege.* 2dly, *If a defendant dwell out of the county palatine, he who hath cause to complain in equity, may also complain here in the chancery; for in respect that proceedings in chancery do bind the person only, if the person be out of the jurisdiction, the chamberlain of Chester cannot relieve the party; and therefore ne curia domini regis deficeret in justitia exhibenda, the suit shall be here in chancery, else the subject should have good right and no remedy, which should be inconvenient; and this pursues the reason of the common law, &c. altho' an action will lie in Wales, yet because he who hath cause of action cannot have justice there, he shall sue in the king's bench; for where the particular courts cannot do justice to the parties, they shall sue in the king's general courts at Westminster, &c. in all cases where it appears to the court, that those who have liberty to take cognizance, do fail of right; as in matter of foreign plea, &c. the matter shall be determined in the general courts of Westminster.* 3dly, *The king cannot grant a commission to determine any matter of equity, but it ought to be determined in chancery, which hath had time out of mind jurisdiction of those matters, and that by the law, &c. On consideration of a certificate of lord Dyer et al' justices in queen Elizabeth's time, concerning the jurisdiction of the county palatine of Chester, it was resolved, that for things transitory, though within the county palatine, the plaintiff may alledge them to be done in any place within England, and the defendant may not plead to the jurisdiction of the court, that they were done within the county palatine.* 12 Co. 114. See Dy. 202, 716.

4. References, 12 Co. Earl *Derby's* case. *Hard. 502, 503. Co. Lit. 167. Hob. 107, 108. 2 Vern. 32, 33.*

5. See rules, *Cujus est divisio, alterius est electio*, case 1. 2. *Chancery not to be ousted of its jurisdiction*, case 1. 2. *Iniquity bars equity*, case 4. *Jurare in propria causa, &c.*

318. *Non valet impedimentum, quod de jure non sortitur effectum.*

IT was adjudged, if a copyhold estate be forfeited to the lord, or escheat, or otherwise come into his hands, if the lord make a lease for years or for life, or other estate, by deed, or without, that this land may never after be granted by copy; for the custom is destroyed, &c. So if the lord make a feoffment in fee of it *sur* condition, (according to Co. Lit. 202. b.) and enter for the condition broken, yet it may never be granted by copy. But if the lord keep the lands in his own hands a long while, or lease them at will, he or his heirs may regrant at pleasure; so if the interruption be tortious, as if the lord be disseised, and the disseisor die seised, or the land be recovered against the lord by false verdict or erroneous judgment; in these cases, till the lands are recovered, or the judgment reversed, &c. by the lord of the manor, the lands were not demised or demisable, yet after they are recontinued, they are grantable again by copy; for *non valet impedimentum, quod de jure non sortitur effectum*, &c. but if the land so forfeited or escheated, before any new grant made be extended *sur* statute on recognizance acknowledged by the lord, or if the wife of the lord in a writ of dower had this land assigned to her, though these impediments are by acts in law, yet forasmuch as they are lawful interruptions, the lands may never after be granted by copy. If a copyholder accept a lease for years of his lord, the copyhold is destroyed for ever, and may never more be granted, &c. 4 Co. 31. a. b.

319. *Nothing shall be a ground to direct a new trial to avoid a judgment at law, that would not be a ground for a bill of review to reverse a decree.*

1. THE defendant's wife had pawned her husband's plate to the plaintiff for 110*l.* the defendant in trover, for this recovered 115*l.* damages against the plaintiff, and had judgment. The bill was to be relieved against this judgment; for that the defendant was privy to the pawning, and had the 110*l.* and proofs being read, it appeared that the defendant had confessed so much, which if it had been proved at the trial, it was agreed that the defendant could not have recovered in trover; and there being no proof now, that the defendant at law could not, by reason of any accident, have his witnesses at the trial, the court would not on any neglect of his grant a new trial; and it was insisted on as a rule, *That nothing shall be a ground to direct a new trial to avoid a judgment at law, that would not be a ground for a bill of review to reverse a decree; and a confession subsequent to a decree, is no ground for a bill of review, nor is the want of any evidence or matter which might have been used in the first cause, and of which the party had then knowledge, any ground for a bill of review; and here is no proof but that the plaintiff might have had the witnesses, that were examined here at the trial; and so this cause was dismissed.* 1 Chan. Ca. 43, 44.

2. References, 1 Chan. Ca. 2, 42. Nels. 42, 63, 64. 2 Vern. Cases 344, 382.

320. *Nullus debet agere actionem de dolo, ubi alia actio subest.*

1. **W**HERE one may have an ordinary remedy, as by action of debt, which is a formed action in the register, he shall not have the extraordinary remedy as case, which is an action extraordinary, and not limited to any certain form in the register. 4 Co. 92. b.

2. *Vide rule, Ubi cessat remedium ordinarium, &c.*

321. *Nullum iniquum est in jure praesumendum.*

1. **T**herefore though the rule be, *That all the term is to be taken as one day in law*, yet the precise time when the deed was inrolled, and the like, are to be tried and proved in *Pais*. It is true, the inrolment, or other matter of record, shall not be tried *per pais*; for the inrolment shall never be drawn in question, but the time of it may; for *nullum iniquum est in jure praesumendum; et stabit praesumptio donec probetur in contrarium*. 4 Co. 70. *Hynde's case*.

2. If an heretic convict would recant, he was to be received, and not punished; but if he relapsed, he was to be burnt without more ado: so the law of God wills not the death of a sinner, but rather that he should repent and be saved; therefore it would be contrary to reason and the law of God, not to receive an offender upon his repentance, or to deprive him of the benefit of his repentance. *Nullum iniquum in lege praesumendum est*. Hard. 64, 65.

3. References, Stat. 2 H. 5. cap. 7. 1 Eliz. cap. 1. 2 H. 4. cap. 15. 29 Car. 2. cap. 9. *Vide etiam* 3 Inst. 43. Bro. Presentment 54. Godb. 33. Doct. & Stud. lib. 2. cap. 29. 12 Co. 56, 57. *Terms del ley tit. Miscreant. Ridl. Review* 81. 1 Ju. Eccl. tit. *Excom'*. 2 Vol. tit. *Herefy or Miscreancy*.

4. See rule, *Actus legis nulli facit injuriam*.

322. *Nullum tempus occurrit regi.*

General.

1. **T**HE king's prerogative is, that no time shall prejudice him, *nullum tempus occurrit regi*, in point of presentation to a church. Stat. *De praerogativa regis*, 17 Car. 2.

2. Against the king there shall be no occupant; because *nullum tempus occurrit regi*; and therefore no man shall gain the king's lands by priority of entry. Co. Lit. 41. b.

3. On promotion of the incumbent to a bishopric, the crown has a general right to the next avoidance, and is not restrained to within the life of the presentee. *Nullum tempus, &c.* The King against The Bishop of Armagh and Dr. Whaley, 1 Ju. Eccl. 25.

4. If

4. If the villain of the king purchaseth lands, and alieneth before the king (upon office found for him) doth enter, yet the king, after office found, shall have the land; *quia nullum tempus, &c.* Aliter of a common person, yet after office found the king shall not have the mean profits; because the title is by the seisure. *Co. Lit.* 118. a.

5. If the fix months be incurred, yet the patron's clerk shall be received, if presented before the church be filled by lapse, and the patron may also present against the king's lapse; a lapse cannot be granted over, as the grant of the next lapse of such a church, neither before it fall nor after. If the lapse incur, and then the ordinary die, the king shall present, and not the ordinary's executor; for it is rather an administration than an interest. *Fitzh. Nat. Brev.* 34. (G.) 25 E. 3. 24. Dy. 87. is doubtful whether to the king or to the metropolitan, and I (says lord Hobart) hold it clear that if the patron present, and his clerk is instituted, and remains 18 months without induction, the king shall not present upon him by lapse, as he may do upon a direct patronage, accruing to him by guard of temporalities, or of his tenant's heirs after institution before induction. *Fitzh. Nat. Brev.* 34, 36. (K.) *For the king cannot have a lapse but where the ordinary might have had it before.* A lapse is an act and office of trust reposed by law in the ordinary, metropolitan, and lastly in the king, (who is *certum et stabilimentum justitiae*) the end of which trust is to provide the church of a rector, in default of the patron; and yet as for him and to his behoof; and therefore as he cannot transfer his trust to another; so cannot he devert the thing wherewith he is intrusted, to any other purpose, and therefore, though the king or bishop may suffer the church to stand void (which yet is *culpa*) yet they cannot bind themselves, that they will not fill the church; for that were *injuria et malum in se*; and therefore shall be judged in law in deceit of the king; for *eadem mens praesumitur regis quae est juris, &c.* Now the ordinary, or he who is to present by lapse, is as it were *negotiorum gestor*, or a kind of attorney, made by law, to do that for the patron which it is supposed he would do for himself, if there were not some let; and therefore the collation by lapse is in right of the patron, and for his turn. 24 E. 3. 26. And he shall lay it as his possession for an assise of *darrein presentment*. 5 H. 7. 43. *Fitzh. Nat. Brev.* 31. (F.) Hob. 154. *Cro. Ca.* 356. 7 Co. 28. Dy. 36. 5 Co. *De jure regis Eccl.* 14. b. 21 E. 3. *Pal.* 311, 312.

6. At common law, if any had usurped upon the king, and his presentee admitted, instituted and inducted, (for without induction the church had not been full against the king) the king might have removed him by *quare impedit*, and been restored to his presentation; for therein he hath a prerogative, *quod nullum tempus occurrit regi*; but he could not present, for the plenarty barred him of that, neither could he remove him any way but by action; to the end the church might be more quiet in the mean time: neither did the king recover damages in his *quare impedit* at the common law, but the *Stat. W.* 2. cap. 5. hath altered the common law in the cases aforesaid, as namely *quod hoc, quod si pars rea accipiat de plenitudine Eccl. per suam propriam praesentationem, non propter illam plenitudinem remaneat loquela, dummodo breve infra tempus semestre impetretur, &c.* and also hath provided remedy in other cases, as by the said act appeareth. And if the king doth present to a church, and his clerk is admitted and in-

stituted, yet before induction the king may appeal and revoke his presentation. But regularly no man can be put out of possession of his advowson, but by admission and institution, upon an usurpation, by a presentation to the church, *cum aliquis jus praesentandi non habens praesentaverit, &c.* and not by the collation of the bishop; for if he collate without title, and his clerk is inducted, this shall not put the rightful patron out of possession; for as lord Coke, lord Hobart, and other authorities of highest credit and reputation say, it shall be taken to be only provisional, made for celebration of divine service, until the patron do present; and therefore he is not driven to his *quare impedit* or assise of *darrein presentment* in that case; but an usurpation by collation shall take away the right of collation that is in another. An usurpation upon a presentation shall not only put out of possession him who hath right of presentation, but right of collation also; and so it is, that at this day the incumbent shall be removed in a *quare impedit* or assise of *darrein presentment*, if there be not a plenarty of six months before the teste of the writ; but then the incumbent must be named in the writ, or else he shall never be removed: yet at the common law, if the ordinary refused to admit and institute the clerk of the patron, or when any disturbed him to present, so as he could not prefer his clerk, he might have his *quare impedit* or assise of *darrein presentment*, and if the church were not full, have a writ to the bishop, to admit his clerk; but so odious was simony in the common law, that before the *Stat. W. 2.* he recovered no damages. At the common law, if, hanging the *quare impedit* against the ordinary for refusing his clerk, and before the church were full, the patron brought a *quare impedit* against the bishop, (and hanging the suit, the bishop admit and institute a clerk at the presentation of another,) in this case if judgment be given for the patron against the bishop, the patron shall have a writ to the bishop, and remove the incumbent who came in *pendente lite* by usurpation; for *pendente lite nihil innovetur*; and therefore at the common law, it was good policy to bring the *quare impedit* against the bishop as speedily as might be. And it is to be observed, that albeit the clerk, who comes in *pendente lite* by usurpation, shall be removed, yet if the rightful patron, being a stranger to the writ, present *pendente lite*, and his clerk is admitted and instituted, he shall not be removed; for else, by the bringing such *quare impedit* against the ordinary, the rightful patron might be defeated of his presentation; and therefore (even after the *Stat. W. 2.*) amongst other things, it was inquired *ex officio* if the church were full? Of whose presentation, &c. And if the plaintiff should have a writ to the bishop, and his clerk admitted, as in most cases he ought, yet may the right patron have his remedy by law. And as it was good policy to bring a *quare impedit* as soon as might be against the ordinary; so it is good policy, at this day, to name the bishop in the *quare impedit*; for then he shall not present by lapse, because his name is in the writ. What then, after the time is devolved to the metropolitan, shall not he present by lapse, because he is not named in the writ? To this it is answered clearly, that he shall not, in that case, present by lapse; for he shall never present or collate by lapse after six months, but when the immediate ordinary might have collated within the six months, and had surceased his time; and so it is if the time be devolved to the king; for the first step or beginning faileth, and in human things, *quod non habet principium, non habet finem.* Co. Lit. 344. b.

Particular cases.

Presentation, how favoured.

* 7. A private act of parliament was, which divides the parish into three, and this act enacts right of patronage and presentation shall belong to the dean and chapter of *D.* in such manner as the nomination or presentation of the old church did, *and not otherwise*; the old church was donative, yet the new church shall be presentative. See case before the house of lords, *Shirt and Carr*, 9 Feb. 1717.

How becomes void.

* 8. By cession or the incumbent's becoming a bishop, &c. see case *Archbishop of Armagh and Attorney General*, before the house of lords, 21 April 1730.

9. See before *General*. *Vide etiam Pal.* 345, 459, 476, 477.

Lawful patron, how favoured.

10. Institution and induction are meerly void against him. See *Archbishop of Armagh's case*, *supra*.

* 11. Tho' generally till foreclosure, the mortgagor is to present, yet where there was an express covenant in the mortgage that the mortgagee shall present to fill up all the avoidance till discharged, it was decreed for the mortgagee. In this case fraud was pretended by the heir of the mortgagor, but it not appearing, and he having consented before the ordinary to the presentation of the mortgagee, and not bringing his bill for relief till after the six months elapsed; the decree was against him. See case *Gardiner and Cooke and others*, before the house of lords, 31 Jan. 1728.

12. *Vide supra etiam 6 Co.* 29. 2 *Cro.* 252, also *Dr. Lancaster's case*, and *Dr. Birch's case*.

Of the ordinary's right.

13. See before, and *Archbishop of Armagh's case* before mentioned.

Of the king's right.

General.

14. Whether the king's right determines by his promotee's death? *Ibid.*

15. Whether where the king has but a temporary right, as that by promotion, whether the rule, *nullum tempus*, &c. will hold? *Ibid.*

16. Whether where the king, or a common person, has but a right to present for one turn only, and he suffers a presentation; and the incumbent to die in possession, his turn be gone? *Ibid.* *Vide etiam ante General*, Case 3.

Whether

Whether institution and induction only, without presentation, be a full plenary against the king; and a dying of such incumbent be a good bar to the king's right.

17. In this case, the judgment of the king's bench in *Ireland* was affirmed, and that in the king's bench here reversed. And the principal points were, Whether the king had not lost his title, accrued by promotion of the late incumbent, on one who was presumed the clerk of the crown's being instituted and inducted only without any presentation by the crown or other in right thereof, and dying in possession? Or whether after such distance of time and several mesn incumbencies, the king may re-assume his title to the presentation? It was said, the reason of their lordships judgment was, that if they should not adjudge the mistaken institution and induction (though there was no actual presentation) a compleat incumbency, the executors of such incumbent, who had so held merely by mistake upwards of 30 years, without any intention of wrong, might be accountable to the crown for all the time such mistaken incumbent enjoyed. *Archbishop of Armagh's case supra.*

18. References, 7 Co. 28. Dy. 36. Bro. Parl. 6. Cro. Ca. 356. Pal. 302, 311, 312. 4 Inst. 356. Ro. Abr. 319. Mod. Ca. 1. 2. Prohibition. Mod. Ca. 1. 2. Fitzb. Nat. Bre. 37. (H.) Da. 33. b. Co. Lit. 180. b. 11 Co. 74. b. Hob. 152, 347.

19. See rule, *Lands are holden mediately or immediately of the crown.*

323. *Nullus recedat e curia cancellariae sine remedio.*

General.

1. **T**HE chancellor said, *Nullus recedat, &c.* But *Fineux* said, *Si nullus recedat sine remedio, ergo nullus indiget esse confessus.* But the common law is ordained for many matters, and some, such as are not remediable at common law, are to be relieved in chancery: but some are remediable by neither, &c. *Vide Elf. Obs.* 47, 48. 4 H. 7. 4. *Doct. & Stud. lib.* 1. cap. 18. 2 *West's Prec.*

Exposition of the rule.

2. This rule is to be expounded, That the chancery giveth remedy for the common law matters, by granting the original writs, which are for the most part returnable into the common law courts: and for matters of conscience, by examining them in chancery itself; but this rule by no means extendeth itself to the law of conscience divine. *Elf. Obs.* 49. 2 *West's Prec.* 176. b.

3. See rule, *Ipsae etenim leges cupiunt ut jure regantur.*

324. *Officers may not examine the judicial acts of the court.*

1. **I**T was (*inter al'*) resolved in the countess of *Rutland's* case, that a *ca. sa.* being awarded against her, by the court of common pleas, the sheriff, or his officers by his warrant, might, without any offence, execute it; for they ought not to dispute the authority of the court, but

to execute the writs to them directed, and hereto they are sworn, &c.

6 Co. 54. a.

2. See rule, *Executio juris non habet injuriam*.

325. *Omne crimen ebrietas et incendit et detegit.*

1. **A** Drunkard, who by his own vicious act depriveth himself of his memory and understanding, shall have no benefit or privilege, as being *non compos mentis*, either to him or his heirs, &c. Co. Lit. 247. a. See 4 Co. Beverley's case.

2. As for a drunkard who is *voluntarius daemon*, he hath, as hath been said, no benefit or privilege thereby; but what hurt or ill soever he doth, his drunkenness aggravateth it. *Omne crimen ebrietas et incendit et detegit*. Ibid.

One may not stultify himself.

3. See rule, *Actus non facit reum nisi mens sit rea*.

I have met with it thus said of a drunkard, *That he is sport for the devil, a laughter to the world, and a beast to himself, and that he falls so often in jest, that at last he falls for ever. And to a man of good sense and sound morals, both an epicure and a sot are odious.*

326. *Omne magnum exemplum aliquid habet ex iniquo, quod publica utilitate compensatur.*

1. **T**HE law presumeth violently that a lay-man cannot be absolutely discharged of tithes; and therefore will not allow a presumption of such discharge; holding it more reasonable that some one man should suffer a mischief to lose such a privilege, being so improbable, and of so dangerous a consequence, than for his particular, to admit a spoil of the church, and a decay of religion, according to the rule, *Omne magnum exemplum*, &c. So though he shall be allowed his discharge by grant, when it appears, yet, when it appears not, *stabitur præsumptioni*, &c. Hob. 297.

2. See rule, *Ex malis moribus bonae leges natae sunt*. Law will rather endure a particular mischief, &c.

327. *Omne majus continet in se minus.*

1. **B**Y a pardon of murder, manslaughter is pardoned. *Fi. Law Eng.* 21.

2. A person attaint is one convict and more. *Omne majus continet minus*. 4 Co. 46. a.

3. An attaint, supposing a verdict to have passed before two justices, whereas it passed before four, is good enough. *Fi. Law Eng.* 21.

4. A Recovery pleaded of three acres where it was of six, also good. Ibid.

5. A condition that I shall not infeoff J. S. is broken if I infeoff him and J. D. Ibid.

6. Where the custom is that a man shall not devise for any higher estate than for life, though a devise be in fee, yet if the devisee will claim but for life, the devise shall be good. 18 E. 3.

7. Where by custom a copyholder may demise in fee, he may demise any lesser estate without other prescription. 4 Co. 23.

8. And where the custom is to demise for life, he may demise to his wife *durante viduitate*; for it is a lesser estate than the custom allows. 4 Co. 30.

9. By Stat. 32 H. 8. which gives power to devise two parts of the land, a devise of all, is a good devise of the two parts, though the statute of 34 & 35 of *Explanations* had never been. Dy. 150. b.

10. If one who is to make a payment, tender more than he ought to pay, it must needs be good; for *omne majus continet in se minus*; though the other ought to take no more than his due; *quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est. Et in majore summa continetur minor.* 5 Co. 115. a.

328. *Omne quod utile aliquando necessarium.*

1. **S**EE rules, *Natura appetit perfectum. Necessitas facit illud licitum, quod, &c. Legum vincula irridet. Vincit legem. Necessity creates equity.*

2. See also *Pal.* 528.

329. *Omnes reges dicuntur clerici.*

1. **R**ESOLVED, That proxies, in their original nature being duties payable for visitation, were grantable to the king, and that he was capable of such grant, especially since such duties have been converted to certain sums of money, in the nature of pensions or annuities; for by the antient law of the realm, the king had power to visit, reform and correct all abuses and enormities in the church: and by the statute made in H. 8.'s time, the crown was but remitted to its antient jurisdiction, which had been usurped by the bishop of Rome. 33 E. 3. *Fitzb. Aid del roy* 103. *Reges sacro oleo uncti spiritualis jurisdictionis sunt capaces.* And proxy is a profit of jurisdiction. 10 H. 7. 18. *Rex est mixta persona cum sacerdote.* Also the king shall have tithes by the common law, whereof no lay person was capable. 22 *Aff. pl.* 75. 21 H. 7. 1. The king himself may visit his free chapels and hospitals. 8 *Aff. pl.* 29. *Nat. Brev.* 42. a. *Omnes reges dicuntur clerici. Causa spiritualis committi potest principi laico.* And whereas it hath been objected, that by means *del grandeur del roy, et de son train*, competent proxies cannot be exhibited to him; and consequently they may not be granted to him; this objection vanisheth, as the proxies, at the time of the grant, were reduced to certain reasonable sums of money. *Da.* 4. a. See 1 *Ju. Eccl.* 5 to 26. *as to the supremacy of the crown.*

2. So he is capable of mortuaries. 2 *Inst.* 491.

3. Also he is capable of tithes. 5 Co. *De Ju. Regis Eccl.* 15. a.

4. So he may visit ecclesiastical bodies. *Ibid.* See also 21 E. 3. See also *Ha. Anal.* 23, 24. *Da.* 4. a. *Gilb.* 181. 2 *Pe. Will.* 119. 2 *Ju. Eccl.* tit. *Charities, Appropriations, Donatives, Chapels.*

5. He may exempt from ordinary jurisdiction or visitation. *Da.* 72, 73.
5 *Co. De. Ju. Regis Eccl.* 9. b. 10. a. 14. b. 15. a.
6. He may appropriate sole. 7 *E.* 3. *Fitzb. Quare Impedit* 19. *Salk. Bishop of St. David's case*, and *Farest. same case.* 11 *H.* 4. 213. b. *Da.* 73. 5 *Co.* 51. *Ha. Anal.* 19.
7. Resignation to him is good, as to the supreme ordinary. *Dy.* 294.
5 *Co. De Ju. Regis Eccl.* 34. *Palm.* 477.

330. *Omne testamentum morte consummatum est.*

General.

1. *U*Ltima voluntas est legitima dispositio de eo quod quis post mortem fieri velit. *Swinb.* 18. *Orph. Leg. sect.* 2.
2. The will hath relation to the testator's death, and not to the making; for till death he is master of his own will. 2 *Ju. Eccl.* 35.

Particular cases.

3. If a man deviseth his lands to one and to his heirs, and the devisee die, living the devisor, the devise is void; for the will was alterable at the pleasure of the devisor, and the heir cannot be a purchaser. 1 *Co.* 155. b.
4. Yet there is a *Donatio causa mortis*, as where a man lying in extremity, or being surpris'd with sickness, and not having an opportunity of making his will, lest he should die before he can make it, gives his goods, with his own hands, to his friends about him; this disposition, if he dies shall operate as a legacy: but if he recovers, the property reverts. *Prec. Chan.* 269.
5. And this *Donatio causa mortis* is in the nature of a legacy, waiting on the death of the testator, and is ambulatory and open till that time; and by a revocation of all former wills it is revoked; and a subsequent devise is to be taken in satisfaction of such donation. It is a gift *in presenti* to take *in futuro*, &c. *Prec. Chan.* 300. 2 *Mod. Ca.* the case *Mitford versus Lord Herbert et al.* And it is to be observed that these donations are not to be countenanced or favoured; therefore ought to be fully proved in all circumstances. *Prec. Chan.* 300.

331. *Omnia praesumuntur legitime facta, donec probetur in contrarium.*

1. *W*HEN one hath a deed in his hand, and it is pleaded to the court, it shall be rather intended that he cometh to the deed by lawful means, than by wrongful. *Omnia praesumuntur legitime facta, donec probetur in contrarium. Injuria non praesumitur.* *Lit. sect.* 377. *Co. Lit.* 232. b.
2. *Vide rule, Injuria non praesumitur.*

332. *Omnia*

332. *Omnia praesumuntur solemniter esse acta.*

General.

1. **T**Hough every parish church is supposed presentative, and that the incumbent ought to come in by admission, &c. yet one may prescribe that it was appropriate, &c. And the commencement of a thing before time of memory cannot be known, &c. 21 E. 4. 65. a. 11 Co. 10. a.

2. Whether appropriations are good or not, may not now, at this distance of time, be called in question, but shall be intended good and to have all requisites to its perfection. *Concurrentibus*, &c. 2 Co. 46. *Archbishop of Canterbury's case*.

3. *Stat. 35 Eliz.* all manors, lands, &c. which at any time thencefore were the possessions of any abbey, &c. after 4 Febr. anno 27 H. 8. granted or conveyed by letters patent by the said king to any, &c. were to be adjudged in the real and actual possession of the said king and his successors, where the same were granted by him or them; In the purview of this statute, four things are to be observed, &c. Vide 2 Ju. Eccl. 462, 463. Notwithstanding any defect, &c. in any surrender, grant, &c. of the said manors, lands, &c. to the late king H. 8. or any other matter or cause whatsoever, &c. so that the scope and purport of the statute was to vest in this king and his successors, all manors, lands, &c. which the abbots, &c. had, notwithstanding the defects aforesaid. 11 Co. 11 b. 12. a. b. 13. a.

4. All appropriations, howsoever defective, were given to the king and his successors, &c. by the true meaning of the laws of monasteries, which meant to give all, as well in reputation as in truth. *Hob.* 148.

5. Tho' there was a defect in the appropriation, yet if the rectory was in reputation appropriate, and so hath been used, it is given to the king by the statute 27 H. 8. or 32 H. 8. and therefore 19 Eliz. in the case of the dean of St. Paul's, it was adjudged that a chantery or college in reputation, and not in law, was given to the king E. 6. by the statute 1 E. 6. by these words, *all and all manner of chanteries, colleges, &c.* 11 Co. 13. a.

6. Old appropriations are to be presumed to be well and lawfully made, &c. *Tri. per Pa.* 301, 392.

7. In things of such antiquity, *Omnia praesumuntur solemniter esse acta.* *Tri. per Pa.* 406. *Pal.* 427.

8. Tho' the appropriation was defective, or that the advowson did not pass by the grant, yet it shall be intended that there was a lawful grant in respect of the antient and continual possession; *Omnia praesumuntur*, &c. which might make the antient impropriation good; for *tempus est edax rerum*, and records, &c. either consume, or are lost, &c. 12 Co. 4, 5. *Hard.* 382.

Particular cases.

9. The case was between *Lord St. John* and *The Dean and Chapter of Gloucester*, for the parsonage impropriate of *Fenmark* in *Glamorganshire*, because he who appropriated was but tenant in tail, yet as it had continued as a church appropriate, it was decreed that this rectory in reputation was given to the king, by the statute of *Monasteries*. 11 Co. 13. a. The same of *Humbalton*, 11 Co. 13. a.

10. *Bullenbam* was appropriate, but no vicarage endowed, yet as there had been one in reputation, &c. Resolved good. 11 Co. 13. a. 12 Co. 4.

11. One had gotten an appropriation, and brought a *quare impedit*, and the defendant pleaded an appropriation; there was no licence produced, yet the court would intend it. 1 Mod. 117.

12. The abbot of *S.* held the parsonage of *L.* to his own proper use, which as a parsonage appropriate came to the king, *H.* 8. by the dissolution of monasteries, anno 31 *H.* 8. who 37th of his reign granted in fee-farm, under which the plaintiff claims; the defendant got presentation from the queen, and to destroy the appropriation shewed the original grant or instrument of it, 22 *E.* 4. with a condition in it, that a vicarage be completely endowed, and alledged it never done; and so the appropriation void; and indeed there was no instrument or proof of any endowment; yet as it all along had been reputed and taken to be appropriate, and a vicar presented, admitted, instituted and inducted, as a vicar rightfully endowed, and paid his first fruit and tenths; it was resolved *per tout le Cure*, it should be presumed the vicarage, by reason of the continuance, was lawfully endowed; *Omnia praesumuntur*, &c. and it would be a dangerous precedent to examine the original of the appropriations of parsonages, and the endowment of vicarages; for the origin of them in time will be lost. 12 Co. 4.

13. One had gotten a presentation to the parsonage of *G.* and brought a *quare impedit*; the defendant pleaded an appropriation, there was no licence of appropriation produced; but because it was antient, the court would intend it. 1 Mod. 117.

14. On issue, if it was a vicarage endowed, or only a stipendiary curacy? 1st, All agreed if there was a vicarage erected and established, tho' there be no endowment, the vicar may not claim any thing: (*viz.*) *Crew*, *Dodderidge*, *Jones* and *Whitlock*. 2dly, It was shewn to be appropriate by licence of the pope in the time of *E.* 2. *Dodderidge*, not good, *Jones* *econtra*, and it would be dangerous to these antient impropriations, if the consent of the king were now to be shewn; and at that time it was taken to be good by the assent without the king. *Dodderidge* denied that the pope, even then without the king, could with the ordinary and patron appropriate. *Crew* agreed with *Jones*, and in things of such antiquity *Omnia praesumuntur solemniter esse acta*, &c. Palm. 426, 427.

15. References, 1 Chan. Ca. 11, 12, 202, 293. Cro. Jac. 515, 255. 2 Ro. 97. S. C. Stat. 31 Eliz. Ley's Rep. 14. Stafford's case. Co. Lit. 6. b. 11. b. 12. a. b. Hard. 82. Tri. per Pa. 301, 406. Co. Lit. 301. a. b. 2 Ju. Eccl. 480, 483.

16. See rule, *In odium spoliatoris omnia praesumuntur*.

333. *Omnia quae sunt uxoris sunt ipsius viri.*

1. **S**O she is disabled to contract with any *sans* consent of the husband; neither may she dispose of any personal matter, though in her own right. Co. Lit. 12. a. b.

2. See rule, *Feme covert under obedience of her husband*.

3. References, 1 Chan. Ca. 169, 170, 266, 280, 308. Doct. & Stud. 25, 28, 38. Gilb. 100, 101, 102. 2 Lev. 107. 1 Mod. 105. 2 Ch. Ca. 96. Gilb. 233, 234, &c. Nels. 387, 436. Gilb. 37, 89, 140.

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Cro.

Cro. Jac. 222, 332. *Yelv.* 136. *Hob.* 216. *Hut.* 17. *Nels.* 346. *Prec. Chan.* 19. 1 *Chan. Ca.* 232. 3 *Rep. Chan.* 90. 1 *Rep. Chan.* 380. 2 *Vent.* 362. 2 *Vern.* 391, 428, 569, 595, 764. *Prec. Chan.* 305.

334. *Omnis forma, per quam quaeque res in propria specie constituitur, perfectio quaedam est.*

1. **W**HERE a thing is not warranted by law in its constitution, it is not the thing it should be, and then it can bear no execution at all; for *jura naturae sunt immutabilia*, which extends to particular matters and forms of every thing, *quae dant esse*; for if you change the essential form, it may be some other thing, but it is not now the same that it was. *Omnis forma, per quam quaeque res in propria specie constituitur, perfectio quaedam est. Perfectum est cui nihil deest secundum suae perfectionis vel naturae modum.* *Hob.* 151.

2. See rules, *Perfectum est cui nihil deest, &c. Jura naturae sunt immutabilia.*

335. *Omnium rerum, quarum est usus, potest esse abusus, virtute sola excepta.*

BY antient canons and councils, *un home ne puiſſoit aver forsque un benefice*, and yet by experience it was found convenient that sometimes, (*viz.*) in cases of necessity or utility of the church, a man should have the charge and fruits of several benefices: this distinction was invented and allowed, that though a man could have but one benefice *in titulo*, yet he might have another *in commenda*, (*viz.*) that another benefice might be commended, and committed to his custody and care, till an able incumbent should be provided for it. But after, great abuses being found in the granting of these commendas by ordinaries; for *Omnium rerum, quarum est usus, potest esse abusus, virtute sola excepta*; another canon was made in the council of Lions, anno domini 1274, for reformation. *Dav.* 79. a.

336. *Once a mortgage and always a mortgage.*

1. **H.** Mortgaged lands, provided that he himself or his heirs male of his body might redeem, yet decreed that his assigns should redeem. *Once a mortgage and always a mortgage.* 1 *Vern.* 33.

2. Mr. H. settled a jointure on the plaintiff his lady, before marriage, and that proving defective, according to the marriage agreement, made an additional jointure, and after made a mortgage to the defendant, anno 1673, for 1000*l.* with interest, of part of the lands in the additional jointure. In the mortgage there was a special clause for redemption, that if Mr. H. or the heirs of his body should in June 1686 pay the 1000*l.* and 60*l.* per annum interest in the mean time, then he or his heirs male might enter. And Mr. H. covenanted, that none but he or the heirs male of his body should be admitted to redeem; and covenanted to pay the 1000*l.* on such a day in 1686 and 60*l.* per annum in the mean time, by half-yearly payments. Mr. H. dies sans issue, the plaintiff brings her bill to redeem, the being

being the jointress *ut supra* of part; and so intitled to redeem the whole. The defendant insists the lands are irredeemable. And on rehearing decreed for the plaintiff, as it was on the first hearing. On the face of the mortgage there is no appearance that there should be no redemption, &c. *Once a mortgage and always a mortgage.* Equity against a man's agreement will let him in to redeem a mortgage. If a mortgage be made to a brother, and in case the mortgagor have no issue male, his brother shall have the lands, such an agreement made out in proof might well be decreed in equity, &c. Decreed interest for the 60*l.* *per annum* being in arrears. 1 *Vern.* 190, &c.

3. References, 2 *Chan. Rep.* 141. 1 *Vern.* 7, 160, 210, 232, 269, 488, 138. 2 *Rep. Chan.* 58, 147, 159.

337. One may not do an act to himself.

1. **A** Man cannot present himself to a benefice, nor make himself an officer, nor sue himself. When one hath a right to lands, and the freehold is cast upon him by a latter title, he shall be remitted to his first title; because there is nobody against whom he might have an action, and he cannot sue himself. 13 *H.* 8. 22. *Lit.* 147. *b.* So one cannot summons himself. 8 *H.* 6. 29. So if the sheriff suffer a common recovery, it is error; for he could not summon himself. *Dy.* 188.

2. A man cannot be both judge and party in a suit; and therefore if a judge of the common pleas be made a justice of the king's bench, though it be but *hac vice*, it determineth his common pleas patent; for if he should be a judge of both benches at once, he should controul his own judgment; for if the common pleas err, it must be reversed in the king's bench. *Fi. Ley* 6. *a.*

3. See rule, *None to be judge in his own cause.*

338. One not to be prejudiced by the act of a third person.

1. **S**EE rule, *Volenti non fit injuria.* *Usury odious in law.*
2. References, *Da.* 67. *a.* *Yelv.* 47. 2 *Ju. Eccl.* 484. *Co. Lit.* 152. *b.*

339. One may not stultify himself.

The sorts of persons of non sane mind.

1. **N**ON *compos mentis* are of four sorts. 1. *Idiota*, who from his infancy by perpetual infirmity is *non compos mentis*. 2. He who by sickness, grief, or other accident, wholly loseth his memory and understanding. 3. *A Lunatic*, who sometimes hath his understanding, and sometimes not, *aliquando gaudet lucidis intervallis*; and therefore he is called *non compos mentis*, so long as he hath not understanding. 4. *And lastly*, he who hath by his own vicious act deprived himself of his memory for a time, as a drunkard, which last sort hath no privilege or benefit to him or his heirs; he is *voluntarius daemon*, and what hurt or ill soever he doth, his drunkenness aggravates it. *Omne crimen ebrietas incendit et detegit.* *Co. Lit.* 246, *b.* 247. *a.* 4 *Co.* 124. *b.*

The

The difference between them, &c.

2. It hath been said, That the great difference between an ideot *a nativitate*, and he who was of sound memory, but became by the visitation of God of *non sane memorie*, is, that an ideot is known by his perpetual infirmity from his nativity; for he never had any sense or understanding to contract with any man, &c. in actions brought against him, he is to appear in proper person, &c. otherwise it is of him who is become *non compos mentis*; for he shall appear by guardian, if he be under age, and by attorney, if of full age. 4 Co. 124.

*As to their acts and their committees.**General.*

3. Regularly ideots cannot stultify themselves. 1 Chan. Ca. 113, 153. As to what acts committees may not do, it is to be observed they may not make leases. 1 Chan. Ca. 19. 1 Vern. 262. They cannot incur. *Ibid.* They cannot build or improve the estate. *Ibid.* They may not alter the nature of the ward's estate, as to make personalty realty, or realty personalty. *Ibid.* and 2 Vern. 192, 414. The acts of lunatics are regularly void, tho' reasonable and for the general good of his family. 1 Ch. Ca. 19, 113. 1 Vern. 155. Gilb. 101.

4. Upon the books have been four several opinions concerning the alienation, or other acts of a man that is *non compos mentis*, &c. for 1. Some are of opinion that he may avoid his own act by entry or plea. 2. Others are of opinion, that he may avoid it by writ, and not by plea. 3. Others that he may avoid it either by plea or by writ; and of this opinion is Fitz. in his *Nat. Brev.* and 4. *Litt.* is of opinion, that neither by plea, nor by writ, or otherwise, he himself shall avoid it, but his heir (in respect his ancestor was *non compos mentis*) shall avoid it by entry, plea or writ; and herewith the greatest authorities of our books agree: and so it was resolved with *Litt.* in *Beverley's case*, (4 Co. 126, &c.) where it is said, it is a maxim of the common law, that the party shall not disable himself; but this holdeth only in civil causes; for in criminal causes, as felony, &c. the act and wrong of a madman shall not be imputed unto him; for that in these cases, *actus non facit reum nisi mens sit rea*; and he is *amens, id est sine mente*, without his mind or discretion; *et furiosus solo furore punitur*. Co. Lit. 247.

*Whether may be avoided, and how may be avoided.**General.*

5. The inquisition hath retrospect. 1 Chan. Ca. 113.

6. *Resolved per tout le Cure*, That every deed, feoffment or grant made by any one *de non sane memorie* is voidable, but not by himself; because of the maxim in law, that no man in pleading shall, being of full age, in any plea to be pleaded by him, be received by the law to stultify and disable his own person. 4 Co. 123. b.

Their Laches.

7. When, in what cases and how laches shall prejudice an idiot or *non compos mentis*, some have taken a difference between a bar of his right and a bar of his entry; for in case of a bar of his right, his laches shall not prejudice him, but in such special case, if he be one of *non compos mentis*, he shall shew that he was such. As if a *non compos mentis* be disseised, and the disseisor levy a fine, in this case at the common law, though the year and day pass, yet he who was *non compos mentis* shall not be bound by it, but may enter, as is proved by the statute *de modo levandi fines*, made anno 18 E. 1. which was but a declaration of the common law, (*viz.*) that a fine is so high a bar and of so great power, that of its own puissant nature, it should foreclose not only those who were parties and privies to the fine, and their heirs, but all the world besides, who were of full age, out of prison, of sound memory, and within the four seas, at the day of the fine levied; unless they put in their claim by their action, or by their entry in *Pais*, within a year and a day; from whence it appeareth that no laches shall bar one of *non sane memorie* of his right. Also it appeareth by the statute 4 H. 7. 24. if a man levy a fine with proclamations, and at the time he, who hath right, is *non compos*, and after recovers his memory, here he is to pursue his action or entry in five years after he becomes of sound mind, and in such case in pleading he is to shew, that at the time of the fine levied he was *non compos*, and all the special matter; but if he never recovered his right mind, there his heir may make his entry, or have his action when he pleaseth; for he is excepted out of the act, and not bound to any time, as is the party himself. 4 Co. 125. And the law is the same of him who is beyond sea; and in such case the lord by escheat shall take advantage of *non sane memorie*, infancy, imprisonment, or being beyond sea, of his tenant. 4 Co. 125. But an idiot or *non compos mentis* by their laches may be barred of their entry as if they are disseised, and the disseisor dies seised, it tolls the entry: but after their deaths their heirs may enter, and take advantage of the infirmity of their ancestor. And his laches, which prejudiced himself, shall not prejudice his heir of his entry. An idiot or *non compos mentis* wants discretion and understanding, and as it comes by the hand of God, God forbid, that the same person's act should bind him whilst under such visitation, &c. *Furiosus autem stipulari non potest, nec aliquid negotium agere, quia non intelligit quid agit. Non multum distant a brutis qui ratione carent.* 4 Co. 125. b. 126. a.

Particular cases.

8. Decreed that conveyances made to the defendant by *Elizabeth M.* of an equity of redemption, be set aside; the bill being grounded on weakness and lunacy of *Elizabeth*, the plaintiff's cousin german, and whose heir the plaintiff is, and the defendant's cousin german in the same degree. There was no proof of lunacy, but she was weak of understanding, she could read, and taught a child to read: two days after the deed she said, she had made it to the end the defendant should have the land; yet because the former communication of such grant was before, and no consideration in the deed, but fraud to be prepared and obtruded on *Elizabeth*, it was set aside by lord chancellor. 2 Chan. Ca. 103.

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* 9. A lunatic by her guardian applies to set aside a voluntary conveyance made in prejudice of the heir at law, and in restraint of that power she had over her estate before such settlement. Not to be set aside for the guardian or heir; but in case the lunatic recover her right mind, she to be at liberty to bring a new bill, or seek other remedy. See case before the house of lords, *Barbara Standard, spinster, a lunatic, by her guardian, versus Meetkerke et al'*, 29 Mar. 1733.

May not be avoided.

General.

10. There are however some acts done by men of *non sane memorie* which no body may avoid. 4 Co. 124. a.

Particular.

11. Therefore if such levy a fine, suffer a recovery, acknowledge a statute or recognizance, neither his heir nor executor shall avoid them; for these being matters of record shall be avoided by no bare averment of *non sane memorie*, for the inconvenience which might follow: and indeed such averment would be against the office and dignity of the judges, who ought not to take any cognizance of the fine or recognizance of one *non compos*. 4 Co. 124. a.

12. There are, it is to be observed, four sorts of privies. 1. *Privy in blood*, as the heir. 2. *Representation*, as the executor and administrator. 3. *Estate*, as of a gift in tail, the reversion or remainder in fee. 4. *Tenure*, as lord by escheat. And two of these privies may disable him who was *non compos*, and avoid his grants, &c. and these two are, 1. Privies in blood, and 2. Representation. But privies in estate and privies in tenure cannot, and therefore if donee in tail, being *non compos mentis*, make a feoffment in fee, and die *sans* issue, he in reversion or remainder shall not enter, nor take any advantage of his insanity of mind. The same law if there be lord by escheat, and his tenant, being *non compos mentis*, makes a feoffment in fee, and dies *sans* heir, the lord shall not avoid it. 4 Co. 123, 124.

Not to be relieved even in equity.

13. It was also resolved, that it being against an express rule or maxim of the common law, that the party should disable himself, that he should not have any relief for the same in equity; for that would be a subversion of a principle or ground of law. 4 Co. 124.

Where the matter is of record.

14. All acts done by one *de non sane memorie* in any court of record, whether concerning his lands or his goods, shall bind himself, and all others whatsoever for ever. All acts which he doth concerning his lands or goods in *Pais*, in some cases, shall bind himself only for life, and in other cases shall bind all for ever. 4 Co. 124, 125. *Tamen quaere as to relief in equity in the case of Standard and Meetkerke, supra.*

Marriage of persons non compos.

15. If one marry a lunatic under committee of the court, he shall be committed, and the marriage is no *superfedeas* of the commitment, though there were consummation. *Prec. Chan.* 203.

16. One by contrivance gets and marries a lunatic, for which both the party, and others concerned therein were committed, and the writings were taken care of for the lunatic, and issue, if any should be of the said marriage. *Gilb.* 99. *Vide Stat.* 15 & 16 *Geo.* 2. *cap.* 30.

As to their tuition, and custody of their fortunes.

General.

17. The king hath the custody of an idiot or lunatic's lands, the latter to account not the former. *Ha. Anal.* 27. *Vide Stat. de Praerogativa.*

18. The care of them may not be to one, his executors, Administrators and assigns. 1 *Chan. Ca.* 19. 2 *Chan. Ca.* 70.

Particular.

19. The law hath provided, as hath been said, for these a tutor, and hath made a provision for the preservation both of their inheritances and goods. And so in the case of an idiot, where there is no expectation but that he should remain all his days *sans* discretion, and the law hath given the custody of him and all that he hath to the king, who is bound of right by his laws, to defend his subjects and their fortunes, and so every subject is in his protection. An idiot can neither defend, nor govern himself, or order his fortune; and therefore it is that the king ought to have and govern him and them, as was the antient common law. *Bracton*, fo. 16. who writ 5 *E.* 1. whereupon followed the statute *de praerogativa regis*, which was but a declaration of the common law, *quod rex habebit custodiam terrarum fatuorum naturalium*, &c. *vue les parols*; upon which lord *Coke* observes, 1. That the king hath but the custody of the lands, though for the life of the idiot, and he hath not the freehold in fee, but that rests in the idiot; for the statute saith, *Quod post mortem eorum reddat eam reſtis haeredibus*. 2. Though the statute saith *custodiam terrarum*, yet the king shall have the custody of their bodies as well as of their inheritances, goods and chattels, and of all such estates as they have by purchase, as those they have by descent by the common law. 3. He ought to be an idiot from his nativity, *a nativitate*, *ſcil. fatuus naturalis*, and not by accident or infirmity. 4. That no feoffment, gift, lease or release, made by an idiot of his inheritance, but may be avoided even during his life; as appears by these words, *Ita quod nullatenus per eosdem fatuos alienetur, nec quod eorum haeredes exhaeredentur*; and that by office, at the suit of the king; and this shall re-vest the land, &c. in the idiot, &c. for the statute is, *quod post mortem eorum reddat eam reſtis haeredibus*, which he could not do if he might not have it in the mean time; and therefore by the office such conveyance is destroyed: and this in no wise infringeth on the maxim; for here the idiot in no plea pleadant disableth or stultifieth himself; but all this is found upon office by the inquisition of 12 men, at the suit of the crown, who

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are not concluded to say the truth. And such office shall bear relation *a tempore natiuitatis*, to avoid all mean acts done by the ideot; but tho' the words of the act are general and emphatical, *nullatenus alienetur*; yet if he alien by fine or recovery, it shall bind him, as hath been said. And after such office found, all gifts made by him of his goods and chattels, and all obligations made by him, are utterly void, and if after such office found, he be sued upon an obligation or writing which he hath made, the king by his writ, so long as the office remains in force, reciting the office, shall command a *supersedeas* to the justices where the suit is commenced; but the king shall not have the custody of the land the ideot held by copy, &c. and yet the ideot's alienation of it shall be void after office found, &c. By the common law the king shall have as great protection of the goods and chattels of an ideot, as of his lands; and that as well the disposal of them as the alienation of his lands is to be remedied and redressed by the king, &c. but if no office be found before the ideot's death, none may be found after, and without office the king is not intitled; the same law if one become *non compos mentis*, &c. But the king is not to take any part of the *non compos*'s estate himself, but to let it go to maintain him and his family; neither hath the king any interest in the person of a *non compos*, as he hath of an ideot; because he may recover his memory; and therefore in the case of an ideot the law saith, *rex habebit custodiam*; but in the case of a *non compos mentis*, *rex providebit*; and as to any alienation made by a *non compos mentis*, the words are the same as in the case of an ideot; *ita quod praedicta terra et tenementa infra praedictum tempus nullatenus alienentur*; and therefore after office found, the alienation, gift, &c. of a *non compos mentis* are in equal case with the alienation or gift of an ideot; and the words in the writ in the Register, *Quia accepimus, quod J. de B. fatuus et idiota existit*, &c. extend as well to a *non compos* as to a natural fool, as appears in the same writ, where it is said, *diligenter inquiras si idem J. fatuus*, &c. so as it appears in judgment of law, *fatuus et idiota* includes as well *non compos*, as *fatuus a natiuitate*; and therefore they are in equal case. 4 Co. 126. b. 127. a. b. In trespass, *quare clausum fregit*, and felled his trees, by Francis against Holmes, the defendant pleaded that it was by office found that Francis was a lunatic, &c. and seised in fee of the lands in which, &c. whereby the king seised his person and lands, and granted the custody of both to the said Holmes, *quamdiu* he should be lunatic, to take the profits to his own proper use, and so justified, and prayed in aid of the king; but adjudged that he should not have aid; for this grant was utterly void; for the king is bound to keep the lunatic, his wife, children and family, with the said profits of his lands, without taking any thing to himself, but all to the use of the *non compos* and his family; to the intent to provide that he who wants reason should not alien his lands, nor waste his goods. And after the office found, the king hath only the provision, and not any custody or possession of the body or lands of a *non compos*, as he hath of an ideot. But if the king provide one to have care and charge, that he who is *non compos mentis* and his family be maintained, and that nothing be wasted; or if one of his own head take this upon him, he is but as bailiff of the *non compos mentis*; and shall account as such to the *non compos*, or his executors or administrators, and such may not fell trees but for necessary house-bote, plough-bote and cart-bote, and to repair an-

tient pales, and this but as bailiff, and what a bailiff may do, and no otherwise. 4 Co. 127. b. &c.

Nota; As to civil causes there have been different opinions, how far a man shall be allowed to stultify himself, for the avoiding of his own acts, as his conveyances, &c. see Co. Lit. 2. b. 246, 247. and 4 Co. 123, &c. Register 228. Fitzb. Nat. Brev. 202. B. C. Orp. Leg. 24, 25. Hard. 153. 1 Chan. Ca. 113, 153. 1 Keb. 133. 2 Chan. Ca. 103. 3 Chan. Ca. 107. 2 Vern. 414. 1 Rep. Chan. 40. 2 Rep. Chan. 221, &c. Gilb. 121.

20. See rule, *Actus non facit reum nisi mens sit rea.*

340. One shall not take advantage of his own wrong or laches.

General.

1. **A** Disseisor infeoffs his father in fee, who dies seised, the disseisee may enter notwithstanding the descent; for he shall be adjudged as to the disseisee, but as disseisor as being *particeps criminis*. Lit. 93.

2. If one be obliged to appear before the justices such a day, at which time he is in prison at the suit of the party, so as that he cannot come, the bond is saved; otherwise if he were in prison for felony or other misdemeanor; for there the fault was his own. 31 H. 6. Fitzb. Bar. 60.

3. Where an infant is plaintiff in an appeal, the parol shall not demur till his full age; for the defendant shall not have advantage *de son tort de mesne*. 27 H. 8. and Bro. Covert 2.

4. If one in execution escape, and the gaoler retake him, he shall remain in execution for the party again, if the party so will; for the escape is *son tort de mesne*. 13 H. 7. 1.

5. A feoffment, which is one's own act, by which a tort is done, shall not avail to bar the donor of his rent; for a man shall not take advantage of his own wrong. 3 Co. 30. a.

6. When a man deviseth lands to be sold by his executors, it is the same as if he had devised the same to the executors to be sold; and the reason is, because he deviseth the lands whereby the descent is broken, and in such case he is to sell as soon as he can; because the mesne profits taken before shall not be assets to pay debts; therefore if he was not compellable to sell as soon as possible, he should otherwise take advantage of his own laches; but if the devise be, that his executors shall sell, there they may sell at any time; for that they have but a bare power and no profit. Co. Lit. 236. a.

Rule.

* 7. All agreements are to be considered as executed, which are made on valuable considerations: and are to be considered as done or performed at the time when, according to the tenor thereof, they ought to have been done or performed, and are deemed to have the same consequences, in regard that the person, or any other claiming voluntarily under him, ought not to profit by his own laches or default, nor those, for whose benefit such contract was made, to suffer thereby. See the case before the house of lords, *Frederick versus Frederick*, 4 May 1731.

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Parti-

Particular to it.

* 8. The case was upon the *Stat. 13 Eliz. c. 10.* That colleges, deans and chapters, parsons, vicars and others shall not lease for more than 21 years, or three lives, and *Stat. 14 Eliz. c. 11.* That in cities, boroughs, towns corporate, or market-towns, they may lease for 40 years, but no longer; in this case the covenant was to renew for 99 years, and the house of lords decreed the dean and chapter to renew for 20 years, and to lease accordingly with all other covenants, except that to renew, and that at the covenanted fine and rent. See case before the house of lords, *Dr. Betsworth and others of Doctor's Commons, against The dean and chapter of St. Paul's,* 2 May 1728.

9 References, 1 *Chan. Ca.* 176, 278. 2 *Chan. Ca.* 27, 126, 207, 208. 2 *Ju. Eccl.* 483, 484.

341. *One is to be just before he is generous.*

1. **T**HE plaintiff's bill was to have satisfaction of a debt, owing to him from *Anthony Dean*; who by his will had devised all his lands to the defendant *D.* and to the heirs of his body, with remainder over to another, and in another part of his will, reciting that he owed the defendant *P.* money on account, he therefore devised to him all his personal estate and made him executor, willing him to pay his debts; upon reading the will, though the clause, as to payment of debts, seemed to relate to the personal estate only, and though the lands were devised to the defendant in tail, with remainder over to another, and that it was objected that the tenant in tail could not be a trustee; yet decreed both real and personal estate to be sold for payment of debts of the testator. 1 *Vern.* 411.

2. The plaintiff's father being seised of a little messuage in *Marlborough* of 8*l.* a year, and also possessed of a personal estate of the value of 25*l.* made his will, and gave several Legacies; and to the plaintiff his eldest son 5*l.* yearly for 40 years, if the plaintiff should so long live, and made *James* his second son executor and residuary legatee; and also devised to him the said messuage in tail, with several remainders over. *James* proved the will, entered on the real, and possessed the personal estate, and paid the plaintiff his annuity to the time of his the said *James's* death; and at his death he left an infant heir, and other children, and made his wife executrix, who proved the will, and after married the now defendant. The defendants pretend that *James* in his life fully administered the estate of the first testator, or however if he had wasted, he left no assets to answer; and therefore refused to pay the annuity; and insisted the real estate was not liable, not being subjected thereto by will, and *James* having by fine docked the intail, and borrowed 50*l.* of the plaintiff, for securing whereof, as also 5*l.* per ann. for three years, *James* conveyed the messuage, &c. in fee to one *P.* in trust for the plaintiff, redeemable at three years end on payment of 50*l.* and interest, and the three 5*l.* which were repaid, and plaintiff had reconveyed, and so had extinguished what, if any right he had, upon the real estate. *Per Cur'*: The devisee of the land being also executor, the land shall be liable to the 5*l.* according to the Case of *Clowdesley and Pelham*; and the rather because it was a provision for the heir who was disinherited; and

and the devisee all his time, which was above 20 years, regularly had paid the same. And as to the pretence of being extinguished, it was nothing in equity; and therefore decreed the plaintiff his arrears and growing annuity for the time to come, &c. account of the profits of the real estate for that purpose, &c. 2 Vern. 143, 144.

3. The defendant's brother being seised of freehold and copyhold, and designing to marry the plaintiff if he had lived, by will drawn by the defendant, by the testator's direction, devised to his said brother all his houses and lands; and also gave to Mrs. Susan A. the plaintiff 200 l. to be paid by his executor in 3 years after the testator's death, and also a stone ring to her, and made his said brother executor, and the testator proposing three years to pay the legacies, the executor desired five. The personal estate falling short, the real was decreed to be bound, and that they were charged even on the face of the will: he need not have devised the lands to his brother, as he was his heir at law, unless he intended he should take them subject to legacies. And he is devisee and executor, and desired to see the will performed; and therefore this is a stronger case than *Cloudesley's*, which was confirmed upon appeal to the lords. Note; this decree was also confirmed on review, and after affirmed before the lords. 2 Vern. 228, 229.

4. One owed his niece A. 100 l. by bond, and having two other nieces B. and C. made his will, and bequeathed 300 l. to his niece A. and 200 l. to his two other nieces, and after he borrows 100 l. more of his niece A. and died 200 l. indebted to her. To prove this 300 l. should go in satisfaction of the debt, Mr. Vernon insisted the rule in equity was, *That where a testator indebted gives his debtee a legacy greater than his debt, it shall go in satisfaction; for a Man shall be intended to be just before he is kind, otherwise where the legacy is less, for that is neither to be just nor kind, and so shall not be taken to be in satisfaction of any part.* Cooper Lord Chan. said it might be as good equity, to construe him to be both just and kind, if he intended to be both. That if any part of this 300 l. be applied to the payment of the debt, as to so much it is no gift; whereas a legacy must be taken to be a gift or gratuity, and there being assets, and some proofs of the testator's greater kindness to A. than his other nieces, his Lordship decreed her the whole 300 l. over and above her debt. Salk. 155.

5. Mr. Fisher was indebted in 50 l. to Cranmer, and left him a legacy of 500 l. and made him executor, and after his will made, borrowed 150 l. more of him, and died. His honour of the rolls decreed, that this legacy should be in satisfaction of both the debts, that contracted after the will, as well as that before. But Lord Chancellor Harcourt reversed the decree; because a court of equity ought not to hinder a Man from disposing of his own as he pleases; and when he saith he gives a legacy, we cannot contradict him, and say he pays a debt; and as to the debt contracted afterwards, he said there was no pretence to make this to be a payment of that. *If a legacy be less than the debt, it was never held to go in satisfaction; so if the thing given was of a different nature, as lands, it should not go in satisfaction of money; so if a legacy be upon Condition; for by the breach he may be a loser, whereas the will intended it for his benefit.* Note; in all these cases, the intention of the party ought to be the rule. Salk. 508.

6. References, 1 Vern. 14, 69, 261. 2 Vern. 64, 480, 481, 482. 1 Chan. Ca. 137. 2 Ju. Eccl. Charity not to hurt another's right.

342. *One not to have advantage of another's good bargain.**General to, and rules.*

1. **W**HERE an heir or trustee buys in an incumbrance, he shall be allowed no more than he pays; unless he bought it to protect an incumbrance to which he himself is intitled; but where a stranger, who hath one incumbrance on an estate, buys in another to protect his own, he shall hold till he is paid all arrears and interest due, &c. And in this case, it being specially circumstanced, he was allowed, on account, the whole money due on the incumbrance he so bought in, though he paid less for it, 1 Vern. 49. Vide post *Particular cases*, case 4.

Particular cases.

2. Tenant in tail, remainder in fee, levies a fine and settles his estate on trustees. 1st, To pay his eldest son 100*l.* *per annum*, and then to make a provision of 100*l.* for each of his younger children, to be raised and paid according to their seniority: and maintenance in the mean time. Lord chancellor decreed, that whereas at the time of the settlement the party was a widower, and had eight children, and declared he never intended to marry again, that in regard he afterwards married a second wife, and had many children by her, that the children by the second wife were equally intitled with the children by the first; and that whereas the deed directs the provision to be raised and paid according to their seniority, that in case of deficiency they should be paid in average; that some of the younger children dying in the life of the father, their administrators should not have any benefit of this provision [case 320.] but the same should cease; but in case any of the daughters had been married in the life of the father, and died, their husbands, as their administrators, should have had their portions; and no certain time being appointed for payment, but the same being left indifferent, it does not naturally attach till the death of the father; and whereas the eldest son had purchased in a statute, which was an incumbrance on the estate, he should be allowed no more than he paid. [See *Cases* 48, 445, 465.] And that the estate must be looked upon as liable, in the first place, to satisfy this incumbrance, and then to raise 100*l.* *per annum* and arrears, and the surplus for raising the provision for younger children, but that their maintenance shall go on in the mean time. 1 Vern. 335, 336.

3. *A.* mortgages his lands to *B.* who sells his interest to *C.* for less than really due, the heir shall not be allowed any benefit of this agreement between *B.* and *C.* but *C.* shall have the whole interest due on the mortgage. [See *Cases* 445, 465.] But if one had purchased without notice of this incumbrance, he might possibly have had an equity to have redeemed the incumbrance for what was actually and really paid. [See *Case* 445.] 1 Vern. 336.

4. The plaintiff had made a mortgage to *J. S.* who finding it a slender security, the plaintiff's wife having a right to dower, assigned it to the defendant for 100*l.* though 150*l.* was due thereon; the plaintiff brought his bill to redeem, and wanted the advantage of the defendant's agreement with the mortgagee. *Per Curiam*: Where there are subsequent incumbrances

or creditors in the case, he who buys in a prior incumbrance, shall be allowed no more than he paid; but where the mortgagor himself (as here) or his heir comes to redeem, there is no reason that he should have the benefit of another's good bargain; and ought therefore to pay what is really due on the mortgage, without respect to what the assignee paid. Decreed *accordant*. 1 Vern. 476. *Vide etiam* 464.

343. *Oportet quod certa res deducatur in judicium.*

1. UPON an avowry damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty, &c. *Co. Lit.* 96. a.

2. Error of a judgment in an ejectment, because the declaration was of a messuage and 40 acres of lands, meadow and pasture thereunto appurtenant, and it was not distinguished how much there was in land, how much in meadow, and how much in pasture, wherefore the judgment was reversed. *Cro. Ca.* 573.

3. References, 5 *Co.* 34. b. &c. *Cro. Eliz.* 836. *Ca.* 9. 837. *Ca.* 10. 11. 838. *Ca.* 12.

344. *Pacta privata juri publico derogare non possunt.*

1. IF lands are given to an alien and the heirs of his body, he hath an estate-tail, and yet such estate after his death is not descendible to his issue. 9 *Co.* 141. a.

2. A confirmation may not add a descendible quality to him who is disabled to take by descent. 9 *Co.* 141. b. As if lord and tenant be of a carve of land, and the tenant hath issue, and is attaint of felony, and the king pardon him, and after the lord confirm the estate of the tenant, and the tenant dies, the lord shall have the land even against his own confirmation; for the confirmation may not add to the estate of the tenant a descendible quality to him who was disabled to take the land by descent. 9 *Co.* 141. b.

3. So in the case at bar, the confirmation of the earl to *Eliz.* could not add a descendible quality to the issue in tail, who was disabled by the fine to take by descent; if the confirmation in the case at bar should add to the estate of the wife such a descendible quality, it in effect as to that purpose, should repeal two acts of parliament, that is to say, That of 4 *H.* 7. and 32 *H.* 8. by which the estate-tail is barred *quoad* the issue, and the issue disabled to claim the land by force of the said estate-tail; *sed pacta privata juri publico derogare non possunt*, and these statutes are *jura publica*; for they are two of the principal pillars of the law. 9 *Co.* *Beaumont's* case, 138. b.

345. *Panis egentium vita pauperum, et qui defraudat eos vir sanguinis est.*

General.

1. **H**E that taketh away his neighbour's living slayeth him, &c. and whoſo bringeth an offering of the goods of the poor, doth as one that killeth the ſon before the eyes of the father; he that ſacrificeth of a thing wrongfully gotten, his offering is ridiculous; and the gifts of unjuſt men are not accepted. The moſt high is not pleaſed with the offerings of the wicked; neither is he pacified for ſin, by the multitude of ſacrifices: the bread of the needy is their life; he who defraudeth them thereof is a man of blood; but the ſpirit of thoſe that fear the lord ſhall live; for their hope is in him that ſaveth them, &c. for the eyes of the lord are upon them that love him, he is their mighty protection, &c. See *Eccleſiaſticus chap. 34.*

2. Trustees for a charity may improve for the benefit of the charity, but can do no act to prejudice it, in breach of the founder's rules. 2 *Vern.* 412. for *Panis egentium vita pauperum, et qui defraudat eos homo sanguinis est.* 8 *Co.* 131. *Co. Lit.* 342. a.

Rules.

3. *Panis egentium vita pauperum, &c.*
4. *Summa est ratio quae pro religione facit.* 2 *Chan. Ca.* 18. *Jenk.* 233. 1 *Ro. Rep.* 452.
5. Charity is not barred by length of time, or any ſtatute of limitations. 2 *Vern.* 399.
6. What was once given to charity ought to be ſo applied, and what hath been imbeziled ought to be reſtored and made good. *Doct. & Stud. lib.* 2. *cap.* 55. 2 *Vern.* 389.
7. Charity muſt purſue the intent of the founder. 5 *Co.* 14. 8 *Co.* 131. 11 *Co.* 73. *Mod. Ca. Wright and Hobart's caſe.* 2 *Ju. Eccl.* 157. *Dr. Ratcliff's caſe.* See in the ſame title throughout.
8. Trustees for charity may improve, but not hurt the charity, *ut ſupra.*
9. If one will receive a charity with the yoke tied to it by the founder, he muſt bear it; for they cannot be ſevered. *Skin.* 491.
10. Yet a gift to charity muſt be for relief of neceſſity only, and not for ornament, or ſuperfluity. *Du. Ch. Uſes* 132.
11. And it muſt be according to and not againſt law. *Ibid.*
12. Neither may it do wrong to another's right. *Du. Cha. Uſes* 140, 142. *Hern's Cha. Uſes.*

Particular.

13. Where the revenues of a charity increaſe, and there is no appearance that the founder had any other matter than the good of that foundation in contemplation, ſuch increaſe ſhall go and be applied in augmentation of the allowance to the maſter and fellows and the like in proportion; and if any ſurplus remain, to increaſe their number, and nothing be

converted by the trustees, feoffees, devisees, or other governors or managers, to their own use; for *Panis egentium vita pauperum*, &c. 8 Co. 130. b. The case of Thetford school.

14. The bishop, dean, master of an hospital, and the like, though they have the fee and right in them, cannot discontinue, neither can they, or any parson, vicar, archdeacon, prebend, or any other having ecclesiastical living, though with the assent of their deans and chapters, patrons and ordinaries, or the consent of any others, make any lease, gift, grant or conveyance, estate, charge or incumbrance, to bind his successors, other than for the term of 21 years or three lives, and that in possession, and whereupon the accustomed rent or more shall be reserved. And these, as my lord Coke wisely says, are excellent laws, and have been well expounded, for the maintenance of religion, and good of God's church; for otherwise, saith his lordship, it is to be feared holy church would lose more than it would gain in these days; to which his lordship is pleased to add, *Panis pauperum*, &c. Co. Lit. 342. a.

15. How charity is favoured, see 2 Ju. Eccl. 158 to 205, inclusive.

346. *Par in parem imperium non habet.*

WATSON, late bishop of St. David's was taken up upon an *excom' cap.* and brought by *habeas corpus* in B. R. and pleaded to the writ, That he a lord of parliament, and moved to be bailed; but his motion was rejected. This prelate was sued at Lambeth before the archbishop for simony and several other offences, and now he applied again for a prohibition, on suggestion that he was cited to Lambeth, and not to the arches, &c. but that application proving also fruitless, the court being clear for the archbishop's provincial power over all his bishops, &c. the archbishop proceeded and deprived the bishop; whereupon he appealed to the delegates, suggesting that at law the archbishop alone could not deprive a bishop; but this allegation being also rejected, he moved this court again for a prohibition, suggesting, that all bishops were barons, and *inter se pares, et quod par in parem imperium non habet*; and though a bishop may be censured, yet he cannot be deprived by an archbishop; because their temporalities, which are protected by the common law, are concerned; but it ought to be by convocation, (which the lord chief justice Holt called a new fancy of Sir Bartholomew Shower's,) or by the ecclesiastical commission. The lord chief justice and the rest of the court held clearly, that an archbishop had power over his suffragans, and might deprive. That bishops are co-ordinate, or pares, jure divino, but not jure humano: otherwise their institutions would be to no end. And as to their peerage, it was by reason of their barony, &c. That by the common law the archbishop had a metropolitanical jurisdiction, and archbishops are over bishops, as bishops are over the other clergy; that his power was diminished, and usurped upon by the pope, but restored to its extent by the statute H. 8. That by admitting him power to visit, all is admitted; for he who may visit, may deprive as well as censure; these being but several degrees of punishment, &c. And the prohibition was denied, and the suggestion ordered by the court to be entered on record, that the court might enter their reasons of denial, and so the bishop was taken into custody, and com-

committed to Newgate. See Dr. Watson's case, bishop of St. David's, in Salk. also Farest. S. C. and 2 Ju. Eccl. S. C. still more at large.

347. Particeps criminis not to be relieved.

1. **T**HE defendant being *particeps criminis*, no decree ought to be for him. 1 Chan. Ca. 209. Vide 76.
2. See rules, *He who hath done iniquity shall not have equity. He who would have equity must do it. In odium spoliatoris, omnia praesumuntur. That shall have the benefit, which hath or would have sustained the loss.*

348. Patents and grants of the crown to be taken *secundum intentionem regis, et non in deceptione regis.*

SEE rules, *Apices juris non sunt jura. Maledicta expositio est quae corrumpit textum.*

349. Pater est quem nuptiae demonstrant.

Bastard.

1. **A** Bastard is in law *nullius filius*; and therefore can be heir to no one. Lit. sect. 188.
2. *Cui pater est populus, pater est sibi nullus et omnis. Cui pater est populus, non habet ille patrem.* Co. Lit. 123. a. 213. b. 244. a.
3. If a villain hath a bastard, and after marrieth the same woman, yet this bastard is no villain, as it is a bastard, and consequently *quasi nullius filius*. Co. Lit. 123. a.
4. And for the same reason, when the statute 32 H. 8. of Wills speaketh of children, bastards are not within the said statute; and the bastard of a woman is no child within that statute, where the mother conveys lands to him. Co. Lit. 123. b.
5. It was found by verdict, that Henry the son of Beatrice, who was the wife of R. R. deceased, was born *per undecim dies post ultimum tempus legitimum mulieribus constitutum*; and adjudged, *quod dicitur Henricus dici non debet filius praedicti Roberti secundum legem et consuetudinem Angliae constitutam*; now *legitimum tempus*, in that case, by law, at the furthest is nine months, or forty weeks, but she may be delivered before that time. Co. Lit. 123. b.

Mulier.

6. *Haeres*, or heir, is he who is *ex justis nuptiis procreatus. Haeres legitimus est, quem nuptiae demonstrant, &c.* Co. Lit. 7. b. 237. b. 243. b.
7. See next rule, also *Heir favoured.*

350. Pater et mater et puer sunt una caro.

1. **P**UERI sunt de sanguine parentum, sed pater et mater non sunt de sanguine puerorum; and this is the cause that no lands might descend from the son to the father or mother, but should rather escheat; and therefore

fore if father, uncle and son are, and the son die seised of lands in fee, the uncle shall be heir to the son, and not the father, and yet the father is nearest of blood; but if a lease be made to the son, the remainder to the next of his blood, the father shall in that case take the remainder as purchaser, for in *Littleton's* judgment he is next of blood. *Lit. sect. 3. Co. Lit. 11. a. 3 Co. 40. a.*

2. As *Littleton* saith, it is a maxim in law, that inheritances may lineally descend but not ascend, as appears also by *Glanvil* who wrote in *H. 2.* time, *lib. 7. c. 1. fo. 44. b. Quaelibet haereditas naturaliter quidem ad haeredes haereditabiliter descendit, nunquam autem naturaliter ascendit.* And by *Bracton* also, who wrote in the time of *H. 3. lib. 2. c. 29. Descendit itaque jus quasi ponderosum, quod cadens deorsum recta linea vel transversali, et nunquam reascendit ea via, qua descendit, post mortem antecessorum.* And herewith also agreeth *Briton*, who wrote in *E. 1.* time, *c. 119. De successione.* And herein, though the common law differeth from the civil law, yet in this point, as in all others, the common law is founded upon the law of God, which is the *causa causarum*, as appears by the 27 *Chap. Num.* where the case in judgment before *Moses*, was that *Salphaad* having three daughters and several brothers died, to whom the inheritance should descend was the question? As to the daughters, they claimed *in jure propinquitatis*, as their birth-right, as they were next heirs to their father. The brothers claimed as heirs male, *jure honoris*, to aggrandize and continue the name of their ancestors. This cause seemed of great difficulty to *Moses*; and therefore holy writ informs us he consulted with God upon it, who said to him, *justam rem postulant filiae Salphaad: da eis possessionem inter cognatos patris sui, et ei in haereditatem succedant: ad filios autem Israel loqueris haec: homo cum mortuus fuerit absque filio, ad filiam ejus transibit haereditas. Si filiam non habuerit, habebit successores fratres suos: quod si et fratres non fuerunt, dabitur haereditatem fratribus patris ejus; sin autem nec patruos habuerit, dabitur haereditas his, qui ei proximi sunt, eritque hoc filiis Israel sanctum lege perpetua, sicut praecepit dominus Moyse*, by which general law, which extends not only to the particular case then in question, but also to all other inheritances, persons and times, it is clear the father himself, and all other lineal ascent is excluded, &c. *3 Co. 40. a. b. Vue tout le case.*

3. References, *30 E. 3. lib. Ass. pl. 47. Dy. 374. a. b. Bro. Abr. Administrator 47. Stat. 21 H. 8. cap. 5. 9 Co. 39. Hob. 83, 520. Dy. 151, 264, 310. Fitzh. Abr. tit. Administrator. Etiam tit. Executor, 1, 37, 51. Cay's Abr. Stat. tit. Administrator, etiam Executor.*

4. See rule, *Children are de sanguine patris et matris, sed pater et mater non sunt de sanguine puerorum.*

351. Pendente lite nihil innovetur.

1. **A**T the common law, if hanging the *quare impedit* against the ordinary for refusing his clerk, and before the church were full, the patron brought a *quare impedit* against the bishop, and (hanging the suit) the bishop admit and institute a clerk at the presentation of another, in this case, if judgment be given for the patron against the bishop, the patron shall

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have

have a writ to the bishop, and remove the incumbent who came in *pendente lite* by usurpation; for *pendente lite nihil innovetur*, &c. Co. Lit. 344. b.

2. See rules, *Nullum tempus occurrit regi. Quod non habet principium non*, &c.

352. *Pereat unus ne pereant omnes.*

SEE rule, *Interest reipublicae ne maleficia remaneant impunita.*

353. *Perfectum est, cui nihil deest secundum suae perfectionis vel naturae modum.*

1. **R**Eference, *Hob. 151.*

2. See rules, *Omnis forma, per quam quaeque res in propria specie constituitur, perfectio quaedam est. Jura naturae sunt immutabilia. Quod ab initio non valet*, &c.

354. *Periculosum est res novas et inusitatas inducere.*

1. **W**Hatsoever is against the rule of law is inconvenient, and an argument *ab inconvenienti*, is strong to prove it against law; and new inventions, tho' of a learned judge, and that in his own profession, are full of inconveniences. *Periculosum est res novas et inusitatas inducere.* Co. Lit. 379. a.

2. See rules, *Equity cannot change things, &c. Rectifies mistakes, &c. Regards substance, &c. Will not aid new inventions, &c. Relieves against accidents, &c. Est boni judicis ampliare, &c. Law and equity both shall prevail, &c. Law favours justice and truth, &c. Requireth order and decency, &c. Will not suffer wrong.*

355. *Perpetuities odious in law and equity.*

What.

1. **A** Perpetuity is where, if all who have interest join, yet they cannot either pass or bar the estate. 1 Chan. Ca. 213.

General to.

2. Perpetuities may neither be in law nor equity. 1 Chan. Ca. 239.

Rules.

3. A limitation of one fee upon another upon a contingency to happen within a reasonable compass of time, is no perpetuity. See *Duke of Norfolk's case*, where it is said, That future interests, springing trusts, or trusts executory, and remainders which are to arise upon contingencies, are quite out of the rule and reason of perpetuities, if they are not of remote consideration, but such as will soon wear out; and though there can be no remainder arise after a fee, yet there may a contingent fee out of the first fee, &c. *Prec. Chan. 72, &c. 3 Chan. Ca.*

4. Where are several remainders for life, one after another, but all *in esse* at one and the same time, they are all good; because they produce no inconvenience; all wearing out in a little time by an easy interpretation.

3 *Chan. Ca.* 29.

5. A conveyance made, which breaks no rule of law, introduces no visible inconvenience, favours not of perpetuity, tends to no ill example, sure may be good, though it be a conveyance only of a lease for years. 3 *Chan. Ca.* 51.

6. A devise of a term for years to one, his heirs, executors and assigns, for ever, but if he die before 21, leaving no issue, then to *J. D.* the first devisee dying before 21. The remainder was held to be good, being within the compass of 21 years. *Prec. Chan.* 15. 1 *Pe. Will.* 1, &c.

7. Devise of a personalty to one in tail; remainder over; the remainder is void. *Prec. Chan.* 421. *Gilb.* 75.

8. To one, and if he go about to alien, then to a charity, this is also a void remainder; as tending to a perpetuity. 1 *Vern.* 226.

* 9. Limitations of a personalty, tending to a perpetuity, not good. See case *Ford and Ford*, before the house of lords, 3 *Feb.* 1730.

10. For a perpetuity is a thing odious in law, and destructive to the commonwealth; and therefore not to be countenanced in equity, &c. 1 *Vern.* 163, 164.

11. *Note Lecteur*, If a term be devised to one and to the heirs male of his body, his heirs shall not have it, but his executors; for a term for years, which is but a chattel, may not be intailed; and such devisee might alien the lands to whom he would. 1 *Co.* 87, *a. b.*

12. Where limitations to sons ever take effect, and the estate becomes vested, the remainder and limitation to the daughters becomes void; but if there never was any son (*as in the principal case*) the remainder is good; for the limitation must be construed, if there be a son, then to him, if no son, but a daughter, then to her. *Salk.* 156.

Particular cases.

13. The case in question was, A devise to one and his assigns, and if he died without issue then living, that it should remain to another, it is a void devise; and it is all one as the devise of a term to one and his heirs of his body, if he die without issue, that then it shall remain to another, which is merely void; for such an intail of a term is not allowable at law, for the mischief which otherwise would ensue, if there should be such a perpetuity of a term. And though lord chief baron *Tanfield* doubted, especially by reason of a judgment given before in the king's bench, *Hill. 9 Jac. Rot.* 889. betwixt *Rotherick* and *Chappel*, where *William Cary* possessed of a term for years, devised it to his wife for life, and afterwards that *John* his son should have the occupation thereof as long as he had issue; and if he died *sans* issue unmarried, that then *Joseph* his younger son should have the occupation of the same, as long as he had issue of his body, and if he died without issue unmarried, he devised one moiety to *Dorothy* his daughter; the other moiety to *Robert* and *William* his sons; and made his feme his executrix, who assented to the legacies and died. *John* and *Joseph* both died without issue unmarried; and after *Robert* and *William* enters upon the defendant, claiming the moiety, and lets to the plaintiff:
upon

upon a special verdict, all this matter coming out, judgment was given for the plaintiffs to recover the moiety, which is all one case with the case in question: but the defendant's counsel in the writ of error shewed a difference; for that there is a devise but of the occupation only; but here of the term itself. [*Nota diversitatem.*] 2. It is a devise here of his estate and term, to him and his assigns, wherein is authority given *that he may assign.* 3. The limitation is there, if he die without issue unmarried, which is upon the matter, that if he die within the term; for if he be not married he cannot have issue; but in the case here, he might have issue, and yet if that issue should die *sans* issue in his life-time, it should remain, which the law will neither expect nor suffer. *Cro. Jac. Child and Baylie's case*, see the whole case. *Vide etiam 3 Chan. Ca. 50. which seems to deny the authority of this case, there being nothing in it which tends to a perpetuity, nothing inconvenient, nor any rule of law broken; but a resolution quia volumus; ideo quaere.*

14. Limitation of the trust of a term to baron and feme, and the longer liver of them, for life; and after to the eldest issue of them, none being then born, a good limitation. So the limitation to husband and wife is but one limitation; and so it was admitted by counsel, it being not controverted; for though the trust of a term according to the rule in *Goring and Bickerstaff's case*, *fo. 4.* may be limited to divers persons that are in being, one after another; because the same is transferrable, yet it cannot be good beyond the limitation to a third person, not in being. *Ergo* the limitation to the husband and wife, and longest liver of them, was admitted to be but one limitation in this case. *1 Chan. Ca. 33, 34.*

15. In ejectment, a special verdict was found, and the case was, *H.* possessed of a term for years, devised his land to *A.* and to the heirs of his body, and if *A.* die without issue, living *B.* then to *B.* *Northey*, who argued the case, said, that the judges would allow a limitation in remainder, not only to a person *in esse*, but to the first son of such person *in esse.* *Vide 1 Sid. 451. 1 Cro. 230. 1 Rol. 602.* And the court held that this was a good limitation to *B.* the contingency arising within the compass of a life; and denied *Child and Baylie's case.* *Mr. Gould*, in arguing the case, said, if one make a feoffment to the right heirs of *B.* that this was a good springing use: *Sed tota curia contra eum in hoc*; because it is by way of present limitation; *aliter* where it is future, as to the right heirs of *B.* after his death. *Salk. 225.*

16. A devise of a personalty to *J. H.* for life, and after to all such issue as he should have, jointly, and for want of such, to *Nicholas Downes*, this was vested intirely in *J. H.* as being an intail of a personalty. *Gilb. 75. Prec. Chan. 421.*

17. In this case it was held clearly and decreed, that a devise of a personal estate to one and his issue, or to one, and if he dies without issue, the remainder to another, that the devise over is void, and that the whole interest vested in the first devisee, so as to be liable to his debts. And *Vernon* said, that the reason that a devise over of such personal estate, upon a life only was good, was, because in construction of this court the first devisee had but the use of it, and not the intire property. *Gilb. 79.*

18. Goods and a library were given to the defendant for life, and after to her daughter and her heirs for ever. The plaintiff married the daughter, and now as administrator of the daughter, his late wife, he seeks security for the goods or value at the defendant's death. Decreed *accordant*. 1 *Rep. Chan.* 111, *et etiam fo.* 130, 260. 2 *Vol.* 66. *Abr. Eq. Ca.* 1. *Max. Eq.*

19. A devise of a term for years to the mother for life; the remainder to the son and daughter, is an executory devise, and not a bare possibility; and may be assigned over notwithstanding the authority of *Lampet's case*, 10 *Co.* 46, &c. to the contrary, tho' such remainder-man may die in the life-time of the particular devisee; for it is contrary to good conscience, and a case wherein this court will interpose and hinder any proceedings at law to defeat it. And so 'twas decreed accordingly twice in this court, between *Theobalds* and *Duffoy*, 2 *Mod. Ca.* 101, 102, 103, 104. But if an estate is granted to *A.* for life, and then a grant is to *B.* that he shall have and enjoy the profits for so many years as shall be to come and unexpired at the death of *A.* this is but a possibility; because *A.* hath a greater estate, than for years, though never so long; therefore if lessee for 1000 years grant for life, he hath granted all his estate, and cannot make any limitation over. 2 *Mod. Ca.* 102.

* 20. Devise of all the personal estate to *A.* who was a feme covert; but declared that it was his mind, That the interest and produce should be for her use, separate from her husband, and after her decease to her children till 21, and then the principal to them; but for want of such issue, then he gave all his estate to the issue of *J. S.* and made the said *A.* executrix and residuary legatee; she being only intitled to the interest or produce for her life; the personal estate was not vested in her, and the limitation over to the respondent upon the contingency of *A.*'s dying without issue, is a good limitation. And as for the words *residuary legatee*, they only mean for the purpose in the will. See case *Staines and Maddox*, before the house of lords, 18 April 1728.

* 21. One having an assignment of a mortgage for 1000 years, with a covenant from the assignor, that the mortgagor and his heirs should in seven years make absolute the term, makes his last will and testament, and therein reciting, that the mortgagor and his heirs and assigns were to convey the inheritance to the testator and his heirs, devises as an inheritance to three several persons, for life one after another, with remainders to their first and other sons respectively, with remainders over to two others; these remainders over are void; as too remote, and tending to a perpetuity. See case *Wilkins Brett versus Sawbridge et al'*, before the house of lords 26 March 1736.

22. Sir *James Gray* being possessed of an annuity of 14*l.* per annum, for 99 years out of the exchequer, on his marriage covenants with *A.* and *B.* to pay this annuity to his wife, for her separate use, and after the death of either of them, then to the survivor for life, and after the death of both to the child or children to be begotten between them, and in default of such child or children, then to his own executors or administrators, for the residue of the term. Sir *James* and his lady had issue one only son, who lived to be five years old, and then died. And after the death of Sir *James* and his lady, the plaintiff took out administration to the son, and brought this bill against the executors of Sir *James* and his lady, for

this annuity. It was insisted by Mr. *Vernon*, That the limitation to the executors and administrators of Sir *James* was void; being after a limitation to the child or children, which is the same as if it had been limited to the issue; and the settlement of a term on trustees, in trust to permit the father to receive the profits for as many years of the term as he should live, and after to permit the mother to receive the profits for so many years as she should live, and then in trust to permit the child or children, or issue, to receive the profits for the residue of the term, will bear no limitation over in default of issue, or children, in case there be any one in being, no more than such a limitation of the term itself, would be good; for this would be to revive and introduce all the inconveniences of a perpetuity, which has been so long exploded; and *the trust of a term must be limited in the same manner as the term itself will bear a limitation*. But the chancellor said, This being by way of covenant, no more passed out of him, than to serve the uses expressed, and it was not a disposition of the annuity itself, but only a covenant to pay the 14*l.* *per ann.* in such manner; and since it was never divested out of Sir *James*, he would not by this bill, on any pretence of equity, tear it out of him or his executors, and so dismissed the bill: though he did not at all dispute the case, if it had been a term, or the trust of a term, settled in such manner, that the remainder would not have been good; but here it was only a covenant to pay the 14*l.* and not the annuity itself, which was thought by some of the bar, to be an over nice distinction. But this decree, says our reporter, seems to be reasonable, because the administrator comes for a specific performance of the covenant, and that he cannot do, who was not originally in contemplation, or intended to be provided for by the covenant; but if the term had actually been vested in these uses, then the interest of the term being vested in the child and the heirs of his body, as it must be, if the settlement had been drawn according to the covenant, it must have gone to his administrator. *Gilb.* 97, 98.

23. References, 1 *Vern.* 35, 39, 65, 161, 162, 234, 257, 329, 462. 1 *Roll. Abr.* 612. *sect.* 3. 1 *Vern.* 304, 475, 479, 499, 328. *Cro. Jac.* 459, 461. 3 *Chan. Ca.* *per tout, et perticularment fo.* 7, 19, 20, 21, 22, 28, 31. 1 *Pe. Will.* 106. *Mod.* 115. 3 *Chan. Ca.* 42, 46, 48. *Nelf.* 181, 280, &c. 398, &c. *Gilb.* 105. 8 *Co.* 94. *b.* *Ro. Abr.* *Devise* 612. 1 *Co.* 156. 10 *Co.* 87. *Cro. Jac.* 590. 3 *Lev.* 64. *Cro. Eliz.* 204. 1 *Chan. Ca.* 8, 129. 3 *Chan. Ca.* 35, 36. *Nelf.* 116. 1 *Lev.* 256. *Gilb.* 128, 149. *Pal.* 333. 2 *Vern.* 38, 43, 59, 195, 668, 680. 2 *Rep. Chan.* 66, 153. 3 *Lev.* 401. *Sir W. Jo.* 15. *Cro. Eliz.* 576. 2 *Rep. Chan.* 230. *Sid.* 37, 191. 2 *Sid.* 21, 26. 2 *Saund.* 198, 384, 387. 1 *Lev.* 131. 2 *Lev.* 232. 3 *Lev.* 408, 431. 2 *Vern.* 286. 6 *Mod.* 191. 1 *Vern.* 145, 146, 147, 150. 2 *Vern.* 65, 241, 245, 661, 759. *Fitzb. Abr.* 238. *b.* *Bro. Abr.* 234. *b.* 235. *a.* (13.) *Fi. Ley* 45. *b.* 1 *Pe. Will.* 651, &c. *Dy.* 74. *Plow. Com.* 521. *Ow.* 33. *Lit. Bro. sect.* 334, 388. 1 *Ro. Abr.* 610. *Mar.* 106. 1 *Chan. Ca.* 129. *Cro. Ca.* 346. *Sty.* 251, 274. 1 *Leqn.* 259.

356. *Per rationes pervenitur ad legitimam rationem.*

Ratio est radius divini luminis, and by reasoning and debating of grave learned men, the darkness of ignorance is expelled : and by the light of legal reason, right is discerned, and thereupon judgment given according to law, which is the perfection of reason ; and is by *Littleton* called *legitima ratio*, whereunto no man can attain but by long study, often conferences, long experience, and continual observation, &c. *Co. Lit.* 232. b.

357. *Personal estate to go in ease of the real.*

General and Rules.

1. **T**HE personal estate is the general fund to pay debts. *Gilb.* 129.
2. The personal estate to go in aid of the heir. 2 *Chan. Ca.* 59, 84. *Nelf.* 342, 353. *Gilb.* 164.
3. And that though the lands are actually charged, yet the personal estate is to be applied in aid, unless there be an express clause to except it. *Nelf.* 342, 343, 351, &c. 414, 416. *Gilb.* 72, 73, 125.
4. *Lord Chancellor* declared, that the personal estate, in the hands of the executor, shall be employed in ease of the heir, by whatever means he became indebted as heir. 2 *Chan. Ca.* 5, 84, 271. 1 *Vern.* 436. *Salk.* 449. 1 *Chan. Ca.* 297. 2 *Vern.* 349. 1 *Chan. Ca.* 271, 297. 1 *Chan. Ca.* 121.

Particular.

5. The heir being sued, and having paid a debt of his ancestor by bond, decreed he should be reimbursed as far as personal assets came to his hands. 1 *Chan. Ca.* 74, 80, 81.
6. References, 1 *Vern.* 36, 302. 2 *Vern.* 183. *Max. Eq.* 19, &c. 72, 73, 125, 164. *Nelf.* 414, 342. *Prec. Chan.* 2, 3, 101, 183, 209. 1 *Rep. Chan.* 48. *Bac. Abr. Eq.* 295, 296. 2 *Rep. Chan.* 377. 3 *Rep. Chan.* 190, 206 to 214. *Salk.* 159. 2 *Mod. Ca.* 66, 67. 2 *Chan. Ca.* 109.
7. See the rule, *That shall make satisfaction which received the benefit.*

358. *Personal things (actions) die with the person.*

1. **W**HEN corporal damage is done to a man, as battery or the like, if either he beaten, or he who did the battery die, the action is gone. 12 *H.* 8. *Fi. Ley* 5. b.
2. Lessee for years doth waste, and dieth ; a writ of waste lieth not against his executors or administrators. *Co. Lit.* 53. b.
3. The lessor covenanted to pay quit-rents during the term, his executors shall not pay them ; for it is a personal covenant which dieth with the person. 1 & 2 *Pb. & Ma. Dy.* 114.

359. *Personal things cannot be done by another.*

1. **S**UITS of court cannot be done by another. 7 H. 4. 19.
 2. One cannot excuse himself of a contempt, in not serving the king's process, &c. by attorney, but he shall do it in proper person. 22 E. 4. 34.

360. *Personal things cannot be granted over; as matters of pleasure, ease, trust and authority.**Pleasure.*

1. **A**S licence to hunt in my park. 7 H. 4. 36. 12 H. 7. 15.

Ease.

2. As to go to church over my land. To come into my house to eat and drink with me, cannot be granted over. 7 H. 4. 36. b. 12 H. 7. 15.
 3. So a way granted for life over my ground. 7 H. 4. 36. b.

Trust.

4. Patent for life of an office of trust, as to be chamberlain of the exchequer, squire of the body, &c. may not be assigned over, unless it be provided or especially limited in the patent that he may so do; for otherwise he might perhaps grant it to one whom the king would not trust, or who would be careless, &c. 11 E. 4. 1.

5. The keeper of a park, steward of a bailiwick, of husbandry, &c. for life, may not be granted over, being offices requiring skill and diligence. 12 Eliz. 379. Fi. Ley 5. b.

Authority.

6. A. licenceth B. to do such an act, B. may not grant this licence to another. Bro. Licence 25.

7. Upon a warrant of attorney made to one to deliver seisin, he may not grant it over. 19 H. 8. 10.

361. *Perspicua vera non sunt probanda.*

MY lord Coke observes of judge Littleton, that he cited no authority, but when the case was rare or doubtful; for he knew well the rule; *Quod perspicua vera non sunt probanda*. And the like observation, his lordship takes notice, is made of justice Fitzherbert in his *Natura Brevium*. Co. Lit. 16. b. See rule, *Quod constat clare*, &c.

362. Plea shall be taken most strongly against him who pleadeth it.

The order of pleading.

1. **I**N good order of pleading, 1. A man must plead to the jurisdiction of the court. 2. To the person. And therein, 1. To the person of the plaintiff, and then, 2. The defendant. 3. To the count. 4. To the writ. 5. To the action, &c. and if the defendant misordereth any of these, he loseth the benefit of the former. *Co. Lit.* 303. a.

The correspondency.

2. The count must be conformable to the writ; the bar to the count, &c. *Co. Lit.* 303. a.

Declaration.

3. The count or declaration, *narratio*, ought to contain, 1. Certainty. 2. Verity, &c. *Certa debet esse intentio et narratio, et certum fundamentum, et certa res. quae deducitur in judicium.* *Co. Lit.* 303. a.

Plea in abatement.

4. Plea in abatement of the writ, *breve*, ought to be certain also. *Co. Lit.* 303. a.

5. And it must be direct, and not by way of argument. *Ibid.*

Of pleading to the record.

6. Precedent was shewn, which was *Mich.* 5 *H.* 5 *Rot.* 484. An *audita querela* was brought in *B. R.* and because the record was not brought into court, so as the party might have execution, if the matter was found for him, the judgment was, That *querens nihil capiat per breve.* *Cro. Eliz.* 33.

7. In debt the defendant pleads outlawry to the plaintiff, the plaintiff saith *nul tiel record*; and the truth was, That at the time of the plea he was outlawed, but before the day assigned for the bringing in of the record, it was reversed: the court ordered a *respondeas ouster.* *Cro. Ja.* 484. *Dy.* 228. 10 *E.* 3. 22. 29 *E.* 3. 15. 29 *E.* 3. 27. 38 *E.* 3. 17. 44 *E.* 3. 23. 45 *E.* 3. 11. 50 *E.* 3. 15, 16. 6 *H.* 4. 3. 7 *H.* 4. 2. 11 *H.* 4. 39, 41. 14 *H.* 4. 32. 2 *H.* 6. 14. 3 *H.* 6. 15. 4 *H.* 6. 23. 7 *H.* 6. 18. 11 *H.* 6. 49. 12 *H.* 6. 3. 20 *H.* 6. 33. 32 *H.* 6. 27. 33 *H.* 6. 8. 36 *H.* 6. 2, 13. 5 *E.* 4. 3. 6 *E.* 4. 4. 9 *E.* 4. 2. 19 *E.* 4. 6, 9. 4 *H.* 7. 11. 9 *H.* 7. 2. 10 *H.* 7. 20, 24. 11 *H.* 7. 5, 8. 12 *H.* 7. 13. 13 *H.* 7. 14. 21 *H.* 7. 9. *Cro. Eliz.* 33, 340, 572, 707. *Keilw.* 96, 138, 180. *Dal.* 19, 33, 100. *Fitz. Abr.* 65. a. 66. a. *Bro. Abr.* 191. 2 *Vent.* 170. *Vaugh.* 92. *Co. Lit.* 303, &c. *Tow. Tables* 191, 197. *Lutw.* 163, 1272, 1282, 1514. *Sid.* 216. 3 *Lev.* 192. 3 *Mod.* 80. 5 *Mod.* 9. 6 *Mod.* 263. *Salk.* 510, 520, 565, 566. *Skin.* 518, 520. *Plo. Com.* 46. 103. 1 *Co.* 46. 5 *Co.* 9. *Gilb.* 213.

Avowry.

8. The avowant, because he is to make title, ought to avow the several things granted to be antient fees to his office; else the averring one to be antient, implies the other is not so; *for a plea shall be taken most strongly against him who pleadeth it.* Cro. Ca. 50.

9. See Rule, *Regula peccatis quae poenas irrogat aequas.*

363. *Plenum est cui nihil addi potest, secundum modum suae capacitatis.*

1. **A** Benefice is so intire and indivisible, as it cannot be presented or commended by parts, as the cure without the fruits, nor the fruits without the cure, nor the glebe to one; and the tithes to another, &c. *Hob. 153.* see also 151.

2. The acts of presentation, institution and induction, are all authorities given by law, and must be executed according to the form prescribed by law, and may not be modified; for *actus legitimi non*, &c. for the law gives the church, not the patron and ordinary; who are but ceremonious ministers, and are appointed their manner and form, which they may neither exceed nor abridge, &c. *Hob. 153.*

3. *Vide rules, Omnis forma, per quam quaeque res in propria specie constituitur, perfectio quaedam est. Perfectum est cui nihil deest, &c. Jura naturae sunt immutabilia. Quod ab initio non valet, &c.*

364. *Pluralities odious in law.*

SEE rules, *No construction can be too liberal to make parsons reside, &c. In aequali jure melior est conditio possidentis. Nemo potest habere duas, &c. Quando dua jura concurrunt in una, &c.*

365. *Plus peccat author quam actor.*

1. **O**NE is present at the death of another, whom he incited a third person to kill; by this he is principal, as well as he who actually committed the murder. 13 H. 7. 10. 21 E. 4. 71. *Stamf. lib. 1. cap. 45.*

2. *Vide rules, Plus exempla quam peccata nocent. Accessorium sequitur principale.*

366. *Politiae legibus, non leges politiis adaptandae.*

IT is not in any man's power to create new natures in law according to new inventions, except they may stand with *jus commune*, which is *natura universa*; to which purpose, in matter of manners, Tully gives good advice, *contra naturam universam nihil contendamus; eam tamen conservatam propriam sequamur*; was it not so in the case of *Perpetuities*? In the days of popery, every man made new laws, for his proper patrimony, according to his own superstitious purposes; and they stood long in vulgar opinion, not without the assistance of learned men; but now *explosa est sententia*;

sententia, being contrary to the laws; for *politiae legibus, non leges politiis adaptandae*. Hob. 154.

367. *Possessio fratris de feodo simplici facit sororem esse haeredem.*

1. **W**HERE one is seised of lands in fee, having issue a son and a daughter by one *ventre*, and a son by another; and dies, and the eldest son enters, and dies *sans* issue, the daughter shall have the land, and not the youngest son; yet he is heir to the father, but not to his brother; but if the eldest son doth not enter, but die before, then the younger brother may enter as heir to his father; but where the eldest son had entered, and had possession, the sister shall have the land; because *possessio fratris de feodo simplici facit sororem esse haeredem*. If there be two brothers by divers venters, and the eldest is seised of lands in fee, and dieth *sans* issue, and his uncle entereth as heir to him, *as he well may*, who also dieth *sans* issue, now the younger brother may have the lands as heir to the uncle; for that he is of the whole blood to him, though he is but of the half blood to his elder brother. *Lit. sect. 8.*

2. But tenant in tail, albeit he hath a fee-simple expectant, is out of this rule; and therefore if lands be given to a man and his wife, and to the heirs of their two bodies; the remainder to the heirs of the husband, and they have issue a son, and the wife dieth, and he taketh another wife, and hath issue a son, the father dieth, the eldest son entereth, and dieth *sans* issue; the second brother, though but half blood, shall inherit, because the eldest son by his entry was not actually seised of the fee-simple, being expectant, but only on the estate-tail. *The younger brother is now in per formam doni by the Stat. of W. 2. 1. and according to the intention of the party who thus settled the estate; et cujus est dare, &c. and the rule is possessio fratris, &c. and here the eldest son was not possessed of the fee-simple, but of the estate-tail: and where Littleton speaketh only of lands, yet there shall be possessio fratris of an use, of a seignior, a rent, an advowson, and other hereditaments. - Co. Lit. 14. b. 15. a. b.*

3. References, *Ha. Hist. Law* 219 to 223. 3 *Co. Ratcliffe's case, per tout.*

4. See rule, *Propinquior excludit propinquum, &c.*

368. *Possession he who hath, hath right against all, but him that hath the very right.*

1. **R**Eferences, 1 *Chan. Ca.* 25. *Jenk.* 118. 3 *Co.* 52. 5 *Co.* 69. *Hob.* 103, 199.

2. See rules, *That shall have the benefit, which hath or would have sustained the loss. Trespass none to have, but he who hath actual possession. Melior et tutior est conditio possidentis.*

369. *Pos-*

369. Possession of the termor possession of the reversioner.

1. **T**HE father being seised in fee makes a lease for years, the lessee enters, the father dies, leaving a son and daughter by one venter, and a son by another venter, the eldest son dieth during the term, before entry or receipt of the rent; the younger son of the half blood shall not inherit, but the sister; because the possession of the lessee for years is the possession of the eldest son, so as he is actually seised of the fee-simple; and consequently the sister of the whole blood is to be heir. *Co. Lit. 15. a.* For the eldest brother could not enter upon the termor without wrong, neither could he receive the rent till the same was due, which accrued not in his lifetime, by means of the act of God; the death of the eldest son interposing before the rent became due.

2. So it is, if the eldest son be within age, and the guardian in socage enters; but if in the case above, the father makes a lease for life, or gift in tail, and dieth, and the eldest son dieth, leaving the tenant for life or tenant in tail, the younger brother of the half blood shall inherit; because the tenant for life or tenant in tail is seised of the freehold, and the eldest son had nothing but the reversion, expectant upon that freehold or estate-tail; therefore the youngest son inherits as heir to the father, who was last seised of the actual freehold, &c. *Vide plus Co. Lit. 15. a. b.*

3. If the father makes a lease for life, and hath issue two sons, and dieth, and the tenant for life dieth, and the youngest son intrude, and die seised, this descent shall not take away the entry of the eldest; but if the father had made a lease for years, it had been otherwise; for that the possession of the lessee for years maketh an actual freehold in the eldest son. *Co. Lit. 243. a.*

4. *Shellito* and seven others were indicted of forcible entry into a cottage and croft in the *West-riding of Yorkshire*, and that they *manu forti* entered upon the possession of *Anne Binnes*, farmer of *Richard Freiston*, and so disseised the said *Freiston*, *et sic disseisitum eum extraten'* till the day of the inquisition. *Yelverton* moved that the indictment was insufficient; it not being found that *Binnes* was amoved and expelled, and this was the whole force of the matter; for the possession of the farmer or termor is the possession of the reversioner; and without ousting of the lessee, the freeholder could not be disseised; *quod fuit concessum per totam curiam*, and the indictment discharged. *Yelv. 165.*

5. But if the indictment had not expressed *Anne Binnes* to be farmer, but generally that the cottage, &c. was in her possession, then by *Williams*, justice, the indictment which found the disseisin only had been good; because no title was found in any other person but in him who was found to be disseised; but finding the woman to be farmer, this is an estate known and certain, and such farmer ought to be ejected, otherwise he who hath the freehold is not disseised. *Quod nota, per totam Curiam. Yelv. 165.*

370. Possibility cannot be upon possibility.

1. **R**eferences, 1 Co. 156. 10 Co. Loveis's case. 3 Chan. Ca. 29.
2. See rules, Contingency may not depend upon contingency. Perpetuities odious.

371. *Praesumitur rex habere omnia jura in scrinio pectoris sui.*

THE king shall not be intended misconusant of the law; and therefore when he licenceth expressly to alien to an abbot, &c. which is in *Mortmain*, there need not be any *non obstante* of the statute of *Mortmain*; for it is apparent to be granted in *Mortmain*, and the king is the head of the law; and therefore *praesumitur habere omnia jura*, &c. Co. Lit. 99. a.

372. Power or authority cannot be greater than that from whence it is derived.

1. **T**HE attorney of the disseisee cannot make claim off the land, if the disseisee himself durst have gone upon the land. *Litt. Continual Claim*.
2. The bailiff of a disseisor may not say that the plaintiff had nothing in the land; for the master himself should not have had that plea; for that he is not tenant of the freehold. 28 Aff. pl. 24.
3. References, 2 E. 4. 16. Pal. 112. 3 Chan. Ca. 126. 1 Chan. Ca. 242, 264.

373. *Principia probant, non probantur.*

1. **E**VERY proof ought to be by the highest and most supreme cause, and nothing may be higher and more supreme, than the principles and maxims of the law themselves; and therefore they are always to be allowed and admitted without argument or question of their authority; for this very reason, because they are too supremely high to admit of any proof. See 4 Co. 40. a.
2. No reason, says *Dr. & Stud.* need be assigned, why they were first assigned for maxims, &c. and they are not only to be holden for law themselves, but also all other cases similar to them, and that follow upon the same, necessarily are to be governed and decided by them. *Doct. & Stud. lib. 1. cap. 15*.
3. They cannot be questioned, says my lord *Coke*. Co. Lit. 11. a.
4. They suffer no contradiction, but are of the same strength with acts of parliament, when the judges, who have only that power, have determined which are maxims; *contra negantem principia non est disputandum*. Co. Lit. 343. a. But they are good and necessary to all. *Doct. & Stud. lib. 1. cap. 12*. Yet they may be changed, namely, by act of parliament. *Doct. & Stud. lib. 1. cap. 8*.

374. *Prohibetur nequis faciat in suo, quod nocere possit alieno.*

VIDE rule, Every one ought sic uti suo, ut alienum non laedat.

375. *Propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem.*

1. **I**F there be father and son, and the father has a brother, who is uncle to the son, and the son purchaseth fee, and dies *sans* issue, living his father and uncle; the uncle shall have the land as heir to the son, and not the father, yet the father is nearest of blood; because of the maxim in law, That inheritances may lineally descend but not lineally ascend; yet if the son in this case die without issue, and his uncle enter into the land, as heir to the son, as by law he ought, and then dieth without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to his son; for that he cometh to the land by collateral descent, and not by lineal ascent. *Lit. sect. 3.*

2. *Prochein cousin collateral inheritera*, doth give a direction to the next cousin; and therefore the father's brother and his posterity shall inherit before the grandfather's brother and his posterity. *Et sic de caeteris*; for *propinquior excludit propinquum, &c.* Co. Lit. 10. b.

3. It is a maxim in law, *That the next of the worthiest blood shall ever inherit*: as the male and all descendible from him, before the female, and the female of the part of the father before the male or female of the part of the mother, &c. because the female of the part of the father is of the worthiest blood; and therefore among the males the eldest brother, and his posterity, shall inherit lands in fee-simple as heir before any younger brother, or any descending from him, because according to *Littleton* he is *pluis digne de sank. Quod prius est dignius est, et qui prior est tempore potior est jure.* Co. Lit. 14. a.

4. The reasons of the common law, as saith lord Coke, are notable. Every one who is heir to another, *aut est haeres jure proprietatis*, as the eldest son shall inherit sole before all his brethren; *aut jure repraesentationis*, as where the eldest son dies, living the father, his issue shall inherit before the younger son; for though the younger son *sit magis propinquus*, yet *jure repraesentationis*, the issue of the eldest son shall inherit; for he represents the person of his father. And as *Bracton* says, *jus proprietatis*, that which his father had by birth-right descends to him *jure propinquitatis, &c.* 3 Co. 40. b. 41. a.

5. See rule, *Possessio fratris, &c.*

376. *Proximus sum egomet mihi.*

1. **S**O an executor hath preference before others; for that he cannot sue himself. So an executor of an executor may retain (*for he is in privity to the first testator, though not so of an administrator*); but where there is a surviving executor, the executor of the deceased executor may not

not retain; for he is not executor of the first testator; and equity favours not retainers. *Prec. Chan.* 180. Yet,

2. If an executor sue for the *residuum* where he hath a legacy in the will, he shall pay costs. *Prec. Chan.* 92.

3. Relief amongst executors. 8 *Co.* 136. *Plow. Com.* 184. *Co. Lit.* 264. *Tot.* 150, 158. *Cro. Ca.* 373. *Orph. Leg.* 71, 113. *Swinb.* 5th part, fo. 7. 4th Edition. 5 *Co.* 29. *Nels.* 171, 410. 2 *Vern.* case 532. 1 *Chan. Ca.* 200. *Prec. Chan.* 83.

4. Whether trustee for next of kin. *Prec. Chan.* 92, 94, 82, 324, 566. *Nels.* 177, 178, 351, 352. 1 *Vern.* 473. 2 *Vern.* 648. *Gilb.* 74, 75, 106, 184, 200, 208, 209. 1 *Pe. Will.* 7, 8, 9. 2 *Ju. Eccl.* 48, *Mason and Hawkin's case*, etiam fo. 50. *Selwin and Brown's case*.

5. Whether debt extinguished by the obligee making the obligor executor. *Co. Lit.* 264. b. 8 *Co.* 136. *Plow. Com.* 184, 185. *Salk.* 153, 154. *Tot.* 150. 1 *Vern.* case 532, and *Selwin and Brown's case supra*, and cases there cited.

377. Purchaser, without notice, not bound to discover to his own hurt.

General to, and rules.

1. **W**HEN one is obliged to give notice to another, it is thus, when the matter lieth more in the knowledge of the one than the other, and he cannot come to that knowledge but by his means; but when one knows as well as the other, neither is bound to give notice. 3 *Chan. Ca.* 104.

2. Regularly a purchaser without notice shall not discover any thing to hurt himself. 2 *Chan. Ca.* 73.

3. A purchaser *sans* notice may buy in any mortgage, statute or other incumbrance, and if he can defend himself at law, equity will not go against him or hurt him; for equity will not disarm a purchaser: and this rule in chancery is in maintenance of the common law, where the maxims, which refer to descents, discontinuance, non-claims and collateral warranties, are only the wise arts and inventions of the law, to protect and quiet the possession, and strengthen the right of purchasers, &c. *Prec. Chan.* 249, 250.

4. So lord chancellor *Talbot* declared, if a purchaser without notice sell to another with notice, this is good; for said his lordship, as it could not be impeached in the vendor's hands, being a purchaser without notice, tho' the vendee has notice after, yet such notice shall not hurt him; [and indeed to me it seems the same thing to the sufferer, whether the purchaser *sans* notice keeps or sells the estate,] and his lordship further said [and as I apprehend with just distinction] That where a purchaser with notice, conveys to another without notice, the second sale is vicious, because of the former conveyance being with notice, at *Lincoln's Inn Hall*, 7 April 1736. So that this resolution over-rules the opinion of lord keeper in the case in *Prec. Ch.* 51, 52. and surely with the greatest equity; for according to lord keeper's opinion, B. should be in a better condition than A. from whom he purchased, which is unequal and unequitable. And again, the injured party who might have recovered

recovered against A. the first purchaser, as being a purchaser with notice, is thereby defeated of this remedy, by the further tortious acts of one or more who had notice of his title: so that by such resolution a wrong-doer should be still further advantaged of his own further wrong, which it is not, as I apprehend, possible equity should endure; as that would be to make equity countenance fraud and oppression; whilst lord chancellor Talbot's opinion squares with the highest equity, namely, that A. who had notice, and all claiming under or deriving title from him, should be concluded by his notice, whether the others have notice or not; for in such case it must needs be right equity, that they be precisely in the case of A. by whom they claim, and not that they take benefit by his further wrong in passing away his estate, &c.

Particular cases.

5. One purchaseth of a trustee with notice of the trust, in such case the purchaser is trustee to the first trust, though he paid a consideration; *quia participes criminis, consentientes et agentes pari poena pleñentur. Dolus et fraus nemini patrocinetur.* Elf. Obf. 94. Nelf. 378, 379.

6. References, 1 Chan. Ca. 34, 36, 37, 247, 264, 267. Nelf. 103, 130, 137, 212, 166, 167, 409. 1 Chan. Ca. 264. 2 Chan. Ca. 205, 208. Nelf. 366, 367, 9. 2 Chan. Ca. 135, 136, 157. 3 Rep. Chan. 28, 29. 2 Chan. Ca. 47, 264. Prec. Chan. 431. 2 Vent. 360. Gilb. 111, 112, &c. Prec. Chan. 108, 109, 159.

7. See rules, *Nemo tenetur seipsum prodere.* Law and equity shall prevail against equity only.

378. Quae incontinenti, vel certo fiunt in esse videntur.

1. IF the disseisee release to the disseisor, it cannot be defeated by indenture of defeazance made afterwards; but at the time of the release of feoffment, &c. the same may be defeated by indenture of defeazance; for it is a maxim in law; *quae incontinenti fiunt in esse videntur.* Co. Lit. 236. b.

2. If a man sue me in a proper court, and his suit be utterly without ground of truth, and that known to him, I may have an action *sur le case* against him for the undue vexation and damages sustained, though the suit was lawful, and as such I cannot complain of it; or if you charge me with a crime, in a court no way capable, I may have this action: so if one sue me in the spiritual court for a meer temporal cause. But if a man be imprisoned upon a formal suit, and give bond to procure his enlargement, he shall not avoid it by dures; for that it was lawful, though untruly procured. But in these and the like cases, 1. The new action must not be brought before the first determined. 2. There must not only be a thing done amiss, but also damages either actually sustained or inevitable. 1. As if a man forge a bond in my name, I may not have the action till I am sued, &c. 2. But if it were a recognizance, or fine, I may have deceit presently before execution; for *quae incontinenti vel certo fiunt in esse videntur*, &c. Hob. 266, 267. *Vue tout le case, excellent matter.*

379. *Quaelibet concessio fortissime contra donatorem interpretanda est.*

1. **I**F in the premisses lands be letten, or a rent granted, the general intendment is, that an estate for life passeth; but if the *habendum* limit the same for years or at will, the *habendum* qualifies the general intendment of the premisses; and the reason of this is, that it is a maxim of law, that every man's grant shall be taken, by construction of law, most forcibly against himself. *Quaelibet concessio fortissime contra donatorem interpretanda est*, which is to be understood that no wrong be thereby done; for it is another maxim in law, *Quod legis constructio non facit injuriam*; and therefore if tenant for life make a lease generally, this shall be taken, by construction of law, an estate for the life of the lessor; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion; and so it is, if tenant in tail make a lease generally, the law shall construe this to be such a lease as he may lawfully make, and that is for the term of his own life; for if it should be for the lessee's life, it should be a discontinuance; and consequently the estate which should pass by construction of law should work a wrong. *Co. Lit.* 183. *a. b.* see 42. *a.*

2. So if two jointenants grant a rent of 10s. the grantee shall have a rent of 20s. out of the lands.

3. See rules, *Constructio legis non facit injuriam*. Every man's deed or covenant to be taken most strongly against himself.

380. *Quaelibet haereditas naturaliter quidem ad haeredes haereditabiliter descendit, nunquam quidem naturaliter ascendit.*

SEE rules, *Inheritances may lineally descend, but not ascend*. *Pater, mater et puer sunt una caro.*

381. *Quae non valeant singula, juncta juvant.*

* 1. **T**HOUGH a long length of time intervene, yet where there is apparent fraud, equity will direct an open account, and this court will never lay down rules to confine themselves in cases of fraud. A deed of purchase, after a considerable length of time, was set aside, there being circumstances of fraud; so where undue advantage has been taken of young heirs. And the lord chancellor further declared, that where several gross mistakes appear, thro' the whole complexion of the cause, the court has taken them together, as evidence of the fraud, and that the party was imposed upon in other instances; especially where (as in the principal case) great parts of the account consist in bills of costs, such mistakes shall impeach the whole account; and here his lordship said, the rule may be well applied, which has been so often used in other cases, *Et quae non valeant singula, juncta juvant*. *Giffard and Vaux's case*, before the lord chancellor, 27 Feb. 1739.

* 2. *Robert Bertley Freeman*, being between 22 and 23 years of age, came acquainted with one *Bishop*, a jockey, and bought of him, in the space of 12 months, no less than 13 horses; the method of their dealing was not for more than one horse at a time; but the plaintiff generally rid them hard, or it was at least so pretended, and then growing tired of them, he used to sell them back again to *Bishop*, greatly under the value at which he bought them in; and he never, at any of these bargains, paid any money down, but had the horses on credit, and not only so, but at the same time *Bishop* lent him also ready money; and then the plaintiff gave notes for the price of the horses and the ready money together; the horses were all or most at very extravagant prices, sometimes 42 and sometimes 40 guineas each; yet it was sworn in the cause, that these horses were not, save two of them, sold for more than their real value, and as to those two, one of them was not sold for above two guineas more than it was worth at a market price, and the other not for more than 3*l.* above his real value. Whilst these dealings were carrying on, the plaintiff's father was alive, and had a good estate, and the plaintiff lived with his said father, and had no present fortune, but only was intitled to some remainder or other expectancy on his father's death; however the money amounting to 300*l.* the plaintiff made the defendant a mortgage of such interest as he had, whatever it was; but it was part of the agreement, that this mortgage should be writ in a running hand, and that not by any attorney in the neighbourhood, or other person acquainted with the parties. The plaintiff's present bill is for relief against this mortgage on payment of what is *bona fide* due for the horses at their true value, and the money actually lent. And his lordship was pleased to declare, the plaintiff was well intitled to such relief; and his lordship said, as to the objection, that the present was not a case within the ordinary rules of the court of relieving young heirs against hard agreements; for that here the plaintiff had an estate expectant on the death of his father; his lordship observed, that circumstance would make no difference; for that the court in these cases, doth not enter into inquiries of that sort; what they regard is, *that the heir is such an one as in his father's life-time had no proper subsistence but from his father, and where in such cases the court have found that advantages have been taken of the difficulties the young heir lay under, in most of these instances they have relieved.* In the present case, his lordship observed, at the time these dealings were carrying on, the plaintiff was no more than two or three and twenty years of age; and that the reason acknowledged by the defendant himself, for trusting the plaintiff was, for that his father had a good estate; that the plaintiff himself was so intitled to an expectancy as aforesaid, and that he was a favourite with his mother. Besides his lordship observed, that abstracted from these circumstances, the nature of the transaction speaks a fraud; here is a young gentleman entering into bargains with the defendant for horses: his lordship further observed, that it had been said, equity will not set aside every contract of this sort, where a bargain is to give a little more for a horse than he is worth; and true it is, that if this had been a contract for a single horse, though the price agreed for was more than he was worth, a court of equity would not interfere and rescind the bargain. But what is the nature of the present dealing? Here are thirteen horses bought in 12 months time; and most of them at very high prices, 42 guineas con-

tracted for some of them, 40 for others, three of them are resold to the defendant at much lower prices than they were bought in at. Transactions of this kind, is rather a trading in the way of horses than any thing else; the defendant too has not dealt with the plaintiff in the common way of selling horses, by taking ready money, but upon credit, and at the same time of these contracts for these horses, money is taken care to be lent. This his lordship took notice was a common way of drawing young persons in to supply their extravagances; and another circumstance, giving ground for relief in this case, is, that here is a mortgage given for 300*l.* and at the time the mortgage was made, there is no proof that any account was stated; no particular proof is there of what sums of money were really lent: and besides his lordship further observed, that there was a circumstance of an intended concealment; the mortgage was to be writ in a running hand, and not by any attorney in the neighbourhood, &c. and why was it to be writ in a running hand, &c. if a concealment was not designed? For these reasons his lordship was of opinion, that the mortgage should only stand as a security for what was really due on account of the money lent, and what was due for the horses; and to ascertain what was due for the horses, the defendant was at liberty to bring his *quantum meruit*. Decreed accordant. *Freeman and Bishop's case*, before lord chancellor, 28 April 1740.

382. *Quae sunt minoris culpae, sunt majoris infamiae.*

General.

1. SUCH may not be witnesses, or joined of a jury, who are infamous.

Particular cases.

2. As one attainted of a false verdict or of conspiracy at the suit of the king, or convicted of perjury, or of a *praemunire*, or of forgery, *sur le Stat. 5 Eliz. cap. 14.* and not upon *Stat. 1 H. 5. cap. 3.* or convicted of felony, or by judgment lost his ears or stood upon the pillory or tumbrel, or been branded, or the like; whereby they became infamous for some offence. *Quae sunt minoris culpae, sunt majoris infamiae.* Co. Lit. 6. a.

3. If a champion in a writ of right become recreant, he thereby loseth *liberam legem*, and becomes infamous, and cannot be a witness. Co. Lit. 6. b.

383. *Quando duo jura concurrunt in una persona, aequum est ac si essent in diversis.*

General.

1. THE statute 21 H. 8. *Of Faculties*, was always construed strictly against non-residence and pluralities, as things very prejudicial to the service of God, and the instruction of his people.

Particular cases.

2. And therefore if a bishop be translated to an archbishoprick, or a baron created an earl, now he hath both dignities, as *quando duo jura concurrunt in una persona, aequum est ac si essent in diversis.* Yet within this act

act he may not have but as an archbishop or an earl; for though he has several dignities, yet he is but one and the same person, to whom the attendance and service is to be done: so if a baron be made a knight of the garter, or warden of the cinque ports, he shall have but three chaplains in all, *et sic de similibus; quod fuit concessum, quia difficile ut unus homo vicem duorum sustineat*. But it was argued and resolved in the principal case, that Carmel being retained by lady Montague, before her coverture, might yet take a second living after her ladyship's marriage, within the letter and meaning of the said act; for without question his retainer was not determined or countermanded by the said marriage, though her husband was a lord and peer of parliament, and so might retain chaplains, &c. 4 Co. 118. a.

3. See rules, *No construction can be too liberal to make parsons reside. In aequali jure melior est conditio possidentis.*

384. Quando aliquid prohibetur ex directo, prohibetur et per obliquum.

Feeffment *sur* condition that the feoffee shall not alien to such an one, naming him, is good; therefore if the feoffee infeoff J. N. of intent and purpose that he infeoff the party prohibited, this is a breach of the condition. Co. Lit. 223. But if the condition had been general, that he should not alien, such condition had been void; as against the rule, That perpetuities are odious, and against the general good.

385. Quando jus domini regis et subditi concurrunt, jus regis praeferri debet.

1. **I**F a man hold lands of the king by knight service *in capite*, and other lands of other lords, and dieth, his heir within age, the king shall have the wardship of all the lands by his prerogative, &c. Co. Lit. 77. a.

2. And the king, by his prerogative, shall not only have such lands and tenements which (as hath been said) the heir of his tenant by knight service *in capite* holdeth of other, but such inheritances also as are not holden at all of any, as rent-charges, rent-seck, fairs, markets, warrens, annuities, and the like, &c. Co. Lit. 77. b. 78. a.

386. Quando lex aliquid alicui concedit, concedere videtur et id, sine quo res ipsa esse non potest.

1. **I**F lessee at will sow the land, and the lessor, after the corn sown, and before it is ripe and cut, put him out, the lessee shall have the corn and free entry, egress and regress to cut and carry away the corn; because he knew not at what time the lessor would enter upon him; *aliter* of tenant for years, for there the lessor or reversioner shall have the corn, for he knew when his term must end. Lit. sect. 68. For when the law doth give any thing to any man, it giveth also, impliedly, whatsoever is necessary for the taking and enjoying of the same. Quando lex aliquid alicui

alicui concedit, &c. And the law in this case driveth him not to an action for the corn, but giveth him a speedy remedy; to enter into the land, and to take and carry it away, yet the law driveth or compelleth him not to carry it away at once, or before it be ready: but the law giveth all that which is convenient, (*viz.*) free entry, egress, and regress, as much as is necessary; and if he be disturbed of this way, he may have his action upon the case, and recover damages; for *where the law giveth any thing, it giveth also a remedy for the same.* Co. Lit. 56. a.

2. Trespass upon demurrer, the case was, That one sells lands and, afterwards the vendee, by reason thereof, claims a way over the plaintiff's land, there being no other convenient way adjoining; and whether this were a lawful claim, was the question? and resolved without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity; for otherwise he could not have any profit of his lands: *et e converso*, if a man hath four closes lying together, and sells three of them, reserving a middle close, and hath not any way thereto, but through one of those which he sold, though he reserved not any way, yet he shall have it as reserved to him by law; and therefore it is not any extinguishment of the way by having both lands: wherefore it was adjudged accordingly for the plaintiff. Cro. Ja. 170.

3. References, Co. Lit. 56, 153. a. Cro. Ja. 189, 190. Noy 123.

4. See rule, *Boni judicis est lites dirimere, &c.*

387. *Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est.*

SEE the rule, *Omne majus continet in se minus. In majore summa continetur minor.*

388. *Qui ex damnato coitu nascuntur inter liberos non computentur, &c.*

1. SIR Barth. Shower moved for a prohibition to the ecclesiastical court, to stay proceedings there against a man for marrying his sister's bastard daughter; but it was denied; for the court must judge what is God's law, being mentioned in an act of parliament, (*viz.*) 32 H. 8. and by God's law there, is meant the Levitical law, which prohibits marriage with a man's sister's daughter. The children of a concubine among the Hebrews were not illegitimate. Bastards are by particular constitutions and laws deprived of the privilege of children. *Qui ex damnato coitu nascuntur inter liberos non computentur, &c.* yet the reason of the prohibition seems yet to remain, if there be any morality in the law, 'tis as morally unlawful to marry a bastard issue as legitimate issue. It must be *sanguinis naturalis*, and not *legalis*, or *civilis*, else a woman might marry her bastard son, &c. Comb. 356.

2. References, Brac. lib. 2. c. 29. lib. 5. c. 19. Glanv. lib. 7. c. 1. fo. 44. b. Brit. c. 119. Lit. sect. 3. 188. 401. Co. Lit. 7. 11, 123, 213, 237, 243, 244. 3 Co. 40. 5 Co. De Jure Regis Eccl. 9 a. Vaugh. Har- rison's case, also Hill's case. Hal. Anal. 42. Mo. 907. 4 Co. 29. 6 Co. 22.

Fitz. Abr. tit. Bastard. Stat. 20 H. 3. 1 H. 6. 3. 32 H. 8. c. 28. Bro. Abr. tit. Bastard, Tryal, Visne. Skin. 455. Salk. 548. Rast. Ent. Bastardy, fo. 104. Stat. 9 H. 6. c. 11. Kitch. 64. Dr. & Stud. lib. 2. c. 5. Dy. 369. Da. 51, &c. Comb. 360. Can. 106, 107, 108. 4 Inst. 339. 2 Ju. Eccl. Case Sampson et Ux'. versus Cooke.
 3. Rules, Children are *de sanguine patris*, &c. *Pater est quem nuptiae demonstrant. Pater et mater et puer sunt una caro.*

389. *Quid sit jus, et in quo consistat injuria, legis est definire.*

RULE, Law will not suffer wrong.

390. *Qui non habet potestatem alienandi, habet necessitatem retinendi.*

SEE *Hob. 336. 2 Ro. Ab. 722. p. 19. S. C.*

391. *Quicquid solvitur, solvitur secundum modum solventis.*

General and rules.

1. *Quicquid solvitur, solvitur secundum modum solventis.* 1 Ch. Ca. 106.
 2 Vern. 606.

2. But according to this rule, the party paying must then express it upon what account he pays it; for a declaration of that sort afterwards will not do it: neither will an entry in his book, that the payment was on such particular account, serve the purpose; but it must be a declaration on the payment only, that can apply it. 1 Ch. Ca. 106.

3. The creditor may chuse to which debt he will apply the payment. 2 Ch. Ca. 84.

4. But where the payment was on account of both debts, it shall be proportioned ratably. 2 Ch. Ca. 84.

5. And if the payment be general, then the application is in the party who receives. 2 Vern. 606, 607.

Particular cases.

6. A man owes money on mortgage and simple contract to the same person, and pays some money without saying on what account, it shall be taken to be towards discharge of the mortgage; because it is natural to suppose a man would rather chuse to pay off the money for which he was to pay interest, than the other for which none was payable. 1 Vern. 24. *Quaere sur cest case.*

7. P. became bound as security for J. S. to R. S. and J. S. owed a further debt on simple contract. J. S. and R. S. came to an account for all monies owing to R. S. and there being due to R. S. on the foot of the account

count 85 *l.* *J. S.* makes a bill of sale towards satisfaction of the whole debt. Mr. Solicitor insisted, that it should first go in discharge of the debt on simple contract; for the bill of sale is mentioned to be security, and there is no proof it was to go in discharge of the bond, before that on simple contract; but as the account was taken together, it was to go in discharge of both in proportion, and so decreed. But Mr. Solicitor was strong in his opinion against the decree. 1 *Vern.* 34, 35.

8. The defendant was indebted to the plaintiff on articles under hand and seal, as also on simple contract, on a running account, and made several payments of sums in gross, and entered them in his own books as paid on account of what was due on the articles. Lord Chancellor: Though the rule be, *Quicquid solvitur, solvitur secundum modum solutionis*; yet that is to be understood when at the time of payment he declares on what account he pays it. But if the payment be general, then the application is in the party who receives, and the entries in the defendant's books are not sufficient to make the application. 2 *Vern.* 606, 607. See the two next foregoing cases, and *quaere, tho' this, I conceive, is the more equitable resolution, that where the payment is general, the application should be in the receiver; for else the payer might defer the debt which carries interest, and so ease himself of that charge against both the interest, and intention of the debtee; and besides, this resolution, according to my apprehension, squares with the rule, That every man's act is to be construed most strongly against the actor.*

9. A scrivener at request put out 50 *l.* for the defendant, and took the plaintiff's bond, and three months after delivered it to the defendant; the plaintiff all along paid the interest to the scrivener. In about 5 years time the scrivener called in the principal, and the plaintiff paid him 30 *l.* of it, and the scrivener not having the bond, gave him a receipt for the 30 *l.* in part. This was a void payment; for the plaintiff ought to have seen the money indorsed, besides the plaintiff knew whose money it was; the receipt being for the use of the defendant, and many precedents were cited to the purpose. 1 *Vern.* 150, 151. See 2 *Ch. Ca.* 226, 227. *Pre. Ch.* 209. *Nell.* 441. 1 *Ch. Ca.* 93, 94, 111. 2 *Ch. Ca.* 177, 178.

10. References, 1 *Vern.* 57, 122. *S. C. Nell.* 84, 85. *Pre. Cha.* 178. *Barn.* 83, 128, 189, 321, 322. *Nell.* 89, 90.

392. *Qui facit per alium facit per se.*

1. IF the master command his servant to go to the land, and there to make claim to avoid a descent, and the servant do all which he received in command, and which his master might do; there it is as sufficient as if he had done it himself, for *qui per alium facit, per seipsum facere videtur*. *Co. Lit.* 258. a.

2. See rules, *Qui per alium facit, &c. Accessorium sequitur principale. Nemo potest plus juris ad alium transferre, &c.* Trespass none to have, but who hath actual possession.

393. *Qui*

393. *Qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi.*

1. **B**Y common intendment a bishop hath ordinary jurisdiction of all ecclesiastical causes, within his diocese. *Dā. 44. a.*

2. *Holt* lord chief justice held an archbishop had power over his suffragans, and might deprive: That bishops are co-ordinate, or *pares, jure divino*; but not *jure humano*, otherwise their institution would be to no end: and as to their peerage, it was by reason of their barony: That several abbots sat in the house of peers in former times, and it might as well be pretended they were exempted, and therefore could not be deprived: That by the common law the archbishop hath a metropolitical jurisdiction, and archbishops are over bishops, as bishops are over the other clergy: That his power was diminished and usurped upon by the pope, but is restored to its extent by the statute *H. 8.* That by allowing his power to visit, all is admitted; for he who may visit may deprive as well as censure; these being but several degrees of punishment. By 26 *H. 8.* and 1 *Eliz. c. 1.* the only power given to ecclesiastical courts was to visit, without one word of deprivation; yet they were always allowed a power to deprive. From the time of *H. 2.* until *H. 8.* there hardly is an instance of deprivation of a bishop; and it is true, that before 17 *Ca. 1. c. 11.* confirmed by 13 *Ca. 2.* which takes away the court of high commission, instituted by queen *Eliz.* the deprivations that are of bishops, are by the court of ecclesiastical commissions; but the reason thereof was only, as that was the easier and shorter way, but it cannot be questioned, but a bishop may be deprived for dilapidations. 2 *H. 4. 3. Godb. 259. 3 Bullst. 158, 279. 1 Ro. 86. Mo. 917.* And it is as plain, the law takes no notice of any other who can deprive him. If issue be, whether a parson be deprived or not? the court must write to the bishop; and if it be whether a bishop be deprived or not? they must write to the archbishop of *Canterbury*, &c. *Salk.* and *Farest.* *Watson*, bishop of *St. David's* case, who was deprived for simony and other crimes. 2 *Ju. Eccl. 365, &c.* the same case at full. See 12 *Co. 60.*

394. *Qui haeret in litera haeret in cortice.*

SEE rules, *Apices juris non sunt jura.* Equity will not aid new inventions, &c. Law hath always suppressed new and subtle inventions in derogation of the common law.

395. *Quilibet potest renunciare juri pro se introducto.*

SEE rule, *Alienatio licet prohibeatur, &c.*

2

396. *Qui*

396. *Qui per alium facit, per seipsum facere videtur.*

1. **W**HERE a corporation passes an interest, the common law will not suffer the members of the corporation to give their assent, by proctors or substitutes. *Da. 47. b.*

2. The major part of such corporation must consent to all acts to bind their corporation, by the rules both of common and canon law. *Dav. 47. b. 48. a.*

3. Trespass for taking an hundred sheep *apud Melton Mowbray in regia via ibidem*; the defendant to all besides one, pleaded not guilty, and *quoad* that he pleaded, that the lord *Berkley* was seised of the manor of *Melton Mowbray* in *Melton M.* aforesaid, and that he and all those, &c. had used from time to time, whereof, &c. to have toll, *viz. 2d.* for every 20 sheep of any stranger, brought or driven *per et trans* the said vill by any stranger; and if he were denied by any stranger driving them *per et trans* the said vill, then they had used, time whereof, &c. to distrain for the said toll one sheep so driven; and alledgeth *in facto*, that 220 sheep of the plaintiff's, being a stranger, and not inhabiting there, were driven by one *Ludfield* *per et trans* the said vill, by the plaintiff's command, and because he refused to pay this toll, he that one sheep *cepit et abduxit*, and detained till the toll was paid. *Et hoc, &c.* On demurrer, *inter alia*, it was moved that this plea was not good for the manner of pleading; 1st, because the custom is alledged to be, That if the sheep of any foreigner be driven through, a toll shall be paid; and if it be denied by any foreigner who drives them through, that a distress may be taken; and it is not averred, that he who drove them through was a foreigner, but only that the master was a foreigner. *Sed non allocatur*; for the driving of the servant is the driving of the master, and if he be a foreigner, that sufficeth. *Cro. Eliz. 710.*

4. A dean may not confirm a grant, or affix the chapter seal by proctor; for he, being meerly a stranger to the chapter, is not capable of such procuration; and therefore all that he hath done is void by the rules both of common and canon law. The rule of canon law is, *Absens non potest demandare votum suum, nisi uni de capitulo*. *Inst. Jur. Can. lib. 1. cap. Electionibus*. Another is, *Oportet quod procurator semper institutus sit de collegio*; and a third, *Votum dari non potest per literas*; and the rule of the common law is agreeable to the canon law in this point; for in the high court of parliament the barons may give their votes by procuracy or proxy, but their proctor must be a baron, and a member of the same house; for a stranger is not capable of such proxy. *Da. 47. a. b.*

5. The 11 H. 4. fo. 84. upon a composition for tithes, a parson granted an annuity to the abbot of *Battel*, which grant was confirmed by the bishop, dean and chapter, being patrons; and it appeared, by the deed of confirmation, that the dean was absent, and did not put his seal to it, but the chaunter was his commissary, and put the seal for him; and there it was held, that though the dean might have a president or commissary, for the exercise of his spiritual jurisdiction, yet such commissary may not charge the possessions of the church. *Da. 47. b.*

6 Custom hath established and so fixed the estate of the copyholder, that by the severance of the inheritance from the copyhold of the manor, does not destroy it; for as the lord himself could not oust the copyholder, no more may any other claiming under him do it; for *nemo potest plus juris ad alium transferre, quam ipse habet. Et quod per me non possum nec per alium.* 4 Co. 24. a.

7. References, 2 Mod. Ca. 195, 198. Co. Lit. 258. a.

8. Rules, *Nemo potest plus juris ad alium transferre, quam ipse habet. Trespass none to have, but he who hath actual possession. Qui facit per alium facit per se. Accessorium sequitur principale. Plea shall be taken most strongly against him who pleadeth it. Every man's deed or covenant to be taken most strongly against himself, &c.*

397. *Qui prior est tempore, potior est jure.*

1. **B**Y the statute of *Faculties* it is, that every countess, being a widow, may have two chaplains, whereof every one may purchase licence or dispensation; then when she hath retained two, the statute is executed, for she may not have more than two capable of dispensations; and the retainer of a third may not devalue the capacity of dispensation which was vested in the first two by their retainer; and though a countess might have as many chaplains as she would at common law, yet she may not have more than two capable of dispensation by the statute; and reason demands that he who has served longest should be first preferred, *Et qui prior est tempore, potior est jure.* 4 Co. 89. b. 90. a.

2. All the court agreed, that though an earl or baron, by the statute, may have but two chaplains, capable of pluralities or two benefices; yet he may retain as many chaplains as he pleaseth; but the first two are only the statutable chaplains to have the privilege by the retainer, which shall not be taken from them so long as they remain chaplains, nor any subsequent retainer prevent them. *Cro. Eliz.* 839. *Qui prior est tempore potior est jure.* And a retainer is good without patent, by bare parol. *Mo.* 277. *Quære sur le case Whitcombe and Hickford, en le Common Pleas de l'Exchequer, anno 35 or 36 Eliz.*

3. References, Co. Lit. 14. a. Prec. Chan. 159.

4. Rule, *Propinquior excludit propinquum, &c.*

398. *Qui semel malus semper praesumitur esse malus in eodem genere.*

1. **A**CTION for words, saying of a merchant, *he came a broken merchant from Hamborough*, held actionable; and not like the case where one said of a merchant, *That he was a poor man within these seven years*; or of a workman, *That he was a weak workman, and had but little skill within these few years*, where action lieth not; for that he may be a rich man, or a good workman at the time of the speaking; and there they do not charge him with any crime, and by intendment it may have a good construction; but here he chargeth him with having been once

once broken, *Et qui semel malus semper praesumitur esse malus in eodem genere*, or at least may have an inclination thereto, &c. Cro. Ca. 317, 318.

2. References, 4 Co. *Action de Slander*. Jo. 321. Hut. 125.
3. Rule, *Quae sunt minoris culpa, sunt majoris infamiae*.

399. *Qui sentit commodum, sentire debet et onus.*

1. IF an estate be made by indenture to one for life; remainder to another in fee, *sur condition*, &c. if the tenant for life hath sealed and die, and he in remainder enter, he is bound to perform all the conditions comprised in the indenture, as the tenant for life ought to have done in his lifetime, and yet he in the remainder never sealed any part of the indenture; but the case is, for that in as much as he entered and agreed to have the lands by force of the indenture, he is bound to perform the conditions within the same indenture, if he will have the land, &c. Lit. sect. 374.

2. *Aver le terre*, &c. here is implied an antient maxim of the law, viz. *Qui sentit commodum, &c. et transit terra cum onere*. Co. Lit. 231. a.

3. Though he in remainder be no party to the deed, yet when he entereth, and agreeth to have the land, by force of the indenture he is bound to perform the conditions contained in the indenture, &c. Co. Lit. 230. b. 231. a.

4. If *A.* by deed indented between him and *B.* letteth lands to *B.* for life; remainder to *C.* in fee, reserving a rent; tenant for life dieth, he in remainder entereth into the land; he shall be bound to pay the rent, for the cause and reason yielded before by *Littleton*. Co. Lit. 231. a.

5. In the king's bench between the dean and chapter of *Windsor* and *Hyde*, the case was this; A man leased an house by indenture for years, the lessee for him and his heirs covenants and grants with the lessor, to repair the house at all times necessary; the lessee assigns to *Hyde*, who suffers it to run to decay; the lessor brings his action of covenant against the assignee; and it was adjudged by lord chief justice *Popham* and all the court, that covenant lay, though the lessee had not covenanted for his assigns; for a covenant which extends to the support of the matter demised, is *quodam modo* appurtenant to it, and shall run with it, and in respect that the lessee had taken upon him to bear the charges of repairs, the yearly rent reserved was the less, which turned to the benefit of the assignee, *Et qui sentit commodum, &c.* 5 Co. 24. a. b.

6. The sole question of difficulty was, Whether an action lieth against the assignee for covenant broken, he being not named in the covenant? And *Tanfield* for the plaintiff in error, moved it lay not; for covenant lies not against the executor of covenantor, not being named, as 48 E. 3. 2. and Dy. 114. *a multo fortiori* it lieth not against the assignee, not being named; as old *Nat. Brev.* 102. is; but if it be covenanted for him and his assigns, it is otherwise; as 25 H. 8. *Bro. Cov.* 32. wherefore, &c. But *Popham*, *Clinch* and *Fenner*, (*absente Gaudy*) held clearly, that an action of covenant lies against an assignee in this case, though not named; for a covenant, which runs and rests with the lands, lies for or against the assignees, at the common law; *quia transit terra cum onere*, though the assignee be not named in the

the covenant, and covenant lies against an executor in every case, though not named, unless it be such a covenant, as is to be performed by the person of the testator, which they cannot perform : wherefore the judgment was affirmed. *Cro. Eliz.* 552, 553.

7. Lessee for years covenants to repair the houses during the term ; this shall bind all others, as a thing which is appurtenant and runs with the land, into whosoever hands, &c. as well those who come in by act of law, as by act of the party ; for it is all one in regard to the lessor ; and if the law should be otherwise he might be injured ; and reason requires that they, who take benefit of such covenants as the lessor made with the lessee, on the other hand should be bound by such covenants as the lessee made with the lessor. *5 Co.* 17. *b.*

8. References, *5 Co.* 16. *7 Co.* 39. *b.* *Cro. Eliz.* 552, 553. *2 Inst.* 489. *Cro. Ca.* 221, 222. *Cro. Ja.* 125. *Cro. Eliz.* 383. *Lutw.* 363, 1368. *4 E.* 3. 3. *Dal.* 4, 47, 83, 101. *1 Ro. Abr.* 521, 522, 915. *2 Ro. Abr.* 743, 744. *2 Inst.* 298. *Lit. Bro.* 16. *b.* *Godb.* 70. *Theb.* 34. *Mo.* 179. *Bel.* 16. *b.* *Hob.* 176. *3 Cro.* 361. *4 Co.* 27. *Poph.* 38. *1 Ro.* 576. *Dy.* 262. *Comb.* 185, 186.

400. *Qui sentit onus sentire debet et commodum.*

1. **M**aking of one to be parson, is making him owner of the possessions of the parsonage. And he who is made abbot hath therewith the possessions of the abbey ; for the spiritual office draws with it a right to have the possessions belonging to the office. So the making a body spiritual to be perpetual parson, is not precisely a grant of the glebe and tithes ; but yet as such body is parson they may intermeddle with the glebe and tithes, as things annexed to the office of parson. *Plow. Co.* 500. *a. b.*

2. Reference, *Salk.* 302.

3. Rule, See *last rule.*

401. *Qui potest et debet vetare jubet.*

1. **T**HE plaintiff having a lease of certain mills for 12 years, which was near expired ; the lessor, upon his marriage, makes a settlement of them, to the use of himself for life, then to the first and other sons of the marriage in tail male, remainder to his own right heirs. Afterwards the plaintiff takes a new lease of these mills from the original lessor for 30 years, and lays out 2800 *l.* in new building and improving them ; the defendant was the eldest son of the lessor, and during the time the plaintiff was making the improvements, went to his father and told him he had no power to make any such lease ; that after his, the father's death, the estate would be his, the son's, but never acquainted the plaintiff with that, nor of the settlement made on his father's marriage ; but on the contrary writ to the plaintiff to take care to keep one of his mills, in particular, in repair : then the father dies, and the son recovers in ejectment against the lessee, who thereupon brought this bill to be quieted in the possession, during the residue of the lease, for that the defendant was fully acquainted with the circumstances of the lease, and knew his father had no power to make it, and yet never forbid or cautioned the plaintiff from going on with the repairs,

pairs, but on the contrary, stood by, and encouraged him in the proceedings therein; and so the plaintiff had a decree to hold during the residue of his term; for though the defendant was not privy to the making this lease, but that was only the fraud of the father, yet he being to have the estate after his father's death, and taking notice thereof to his father, and that he had no power to make such a lease, and yet suffering the plaintiff to go on in the repairs of the premises, with a design to reap the whole benefit thereof when his father was dead, was such a fraud and practice in him, as ought to be discountenanced in this court; for *qui tacet consentire videtur; et qui potest et debet vetare jubet*. And it was decreed that the plaintiff should enjoy during the residue of his lease. *Gilb.* 85.

2. Reference, 2 *Lev.* 152.

3. Rules, *Wherever there is suppressio veri, &c. Particeps criminis not to be relieved, and the other rules there referred to.*

402. *Qui tacet consentire videtur.*

1. **R**eferences, 2 *Lev.* 152. *Gilb.* 85.

2. Rules, *Wherever there is suppressio veri, &c. Qui potest et debet vetare jubet.*

403. *Quod ab initio non valet, tractu temporis non convalescet.*

1. **I**F an infant or feme covert make their will, and publish it, and after die, of full age or sole, yet the will is void. *Fi. Ley* 4. *b.*

2. If the husband make a feoffment in fee to the use of *A.* for his life, and after to the use of his wife for her jointure, this is not within the act of 27 *H.* 8. of jointures, though *A.* die, living the husband; for in this and other like cases, as they were out of the act at first, as being uncertain, whether the estate of the wife should commence and take effect immediately upon the death of the husband, as it ought by the act, no subsequent act may make them within the act; for *quod ab initio non valet, tractu temporis non convalescet; et quae malo sunt inchoata principio vix est ut bono peragantur exitu*, and therefore in all those cases, though the wife do attain to them and actually enter, and take the profits, yet she shall have dower in the rest; for if the said act does not bar her, the common law does not conclude her, in such case, of her dower, &c. 4 *Co.* 2. *b.*

3. By lord chancellor *Jefferies*, as the bargain was unrighteous at first, nothing happening after could make it better. 1 *Vern.* 167, &c. see *The case.*

4. References, 5 *Co.* 3. *a.* 8 *Co.* 135. 5 *Co.* 23. *b.* 4 *Co.* 90. 11 *Co.* Dy. 246. *b.* 312. *Cro. Eliz.* 585, 839. *Mo.* 145, 277, 678. *Ro. Abr.* 239. *Dal.* 48. *b.* *Fi. Ley* 4. *b.* *Da.* 32. *a.* 1 *Mod.* 200.

5. Rules, *Haeres est eadem persona cum antecessore. Actus legitimi non recipiunt modum*, case 3. *In aequali jure melior est conditio possidentis.*

404. *Quod constat clare non debet verificari.*

1. **I**N a *quod permittat*, if it appear to the court, that the nuisance is to the damage of the plaintiff, he need not shew it specially. 9 Co. 33.
2. See rule, *Perspicua vera non sunt probanda.*

405. *Quod contra legem fit, pro infecto habetur.*

1. **R**Eferences, Co. Lit. 200. 3 Co. 74. 4 Co. 31.
2. Rules, *Non valet impedimentum, quod de jure non sortitur effectum. Quod ab initio non valet, &c.*

406. *Quod est ex jure, id est justum, quod ab injuria proficitur injustum, &c.*

SEE rule, *Law will not suffer wrong.*

407. *Quod necessitas cogit defendit.*

I conceive I cannot, more to the benefit of those for whom these sheets are more immediately intended, illustrate this rule, than by travelling into the military laws and courts for matter to this end; and therefore without further ceremony I shall proceed.

Martial law,

What, and general to.

1. **I**N truth and reality this is not properly a law, but something indulged rather than even allowed as a law. The necessity of government, order and discipline in an army, is that only which can give these laws any countenance; *quod enim necessitas cogit defendit.*

To whom to extend.

Only to the army in time of war.

2. This indulged law was only to extend to members of the army, or those of the opposit army, but were never intended to be executed or exercised upon others; for others, not listed under the army, had no colour of reason to be bound by military constitutions, applicable only to the army, whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject, though it were in time of war.

In time of peace.

3. And the exercise of this law, whereby any person should lose his life, or member or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice, according to the laws of the land. And this in substance is declared in the petition of right,

right, 3 Car. 1. whereby such commissions and martial laws were repealed, and declared to be contrary to law; and like to this was that famous case of Edmund earl of Kent, who being taken at Pomfret 15 E. 2. the king and divers lords proceeded to give sentence of death upon him, as in a kind of a military court, by a summary proceeding, which judgment was afterwards, 1 E. 3. reversed in parliament; the reason whereof see in lord Hale's Hist. Law 40. For martial law, which is the rather indulged, as hath been said, than allowed, and that only in case of necessity, in time of open war, is in no sort to be admitted in time of peace, when the ordinary courts of justice are open. Ha. Hist. Law 39, 40, 41. Neither concern they any but the soldiery.

Their courts.

Where holden, and before whom.

4. The martial law or military court is held before the constable and marshal antiently, as the *judices ordinarii*, or otherwise before the king's commissioners of that jurisdiction, as *judices delegati*.

The matter of their jurisdiction.

General.

5. Is declared and limited by the Stat. 8 R. 2. cap. 5. and 13 R. 2. cap. 2. and that not only by these statutes, but still more by the common law, is their jurisdiction declared and limited as follows.

Particular to.

I. *Negatively.* II. *Affirmatively.*

I. *Negatively,* They are not to meddle with any thing determinable at common law; and therefore as damages, and the quantity and determination thereof is of that cognizance, the court of the constable and marshal cannot, even in such suits as are proper for their cognizance, give damages against the party convicted before them, but at most order reparation in point of honour, as *mendacium sibi ipsi imponere*; neither can they, as to point of reparation in honour, hold plea of any such words or things wherein the party is relievable by the courts of the common law.

II. *Affirmatively,* Their jurisdiction extends to, 1. Matters of arms, and 2. Matters of war. 1. *Matters of arms (or heraldry)* the constable or marshal had cognizance thereof, viz. touching the right of coat-armour, bearings, crests, supporters, penons, &c. and also touching the right of precedency, in cases where either acts of parliament, or the king's patent (he being the fountain of honour) have not already determined the matter; for in such cases they have no power to alter it; and though these things were antiently allowed and indulged to the cognizance of the constable and marshal, as having some relation to military affairs; yet they were so restrained, that they were only to determine the right, and give reparation to the party injured in point of honour, but not to repair him in damages, as hath been mentioned. See Ha. Hist. Law 36, 37, 38. 2. *Matters of war*, and here the constable and marshal had a double power, 1. A ministerial.

sterial. 2. A judicial one. 1. *Ministerial power*, as they were two great ordinary officers, antiently in the king's army. 1. *The constable*, being in effect the king's general. 2. The marshal was employed in martialling the king's army, and keeping the list of the officers and soldiers therein; and his certificate was the trial of those whose attendance was requisite. Vide *Lit. sect.* 102. 2. *Judicial*, again the constable had also a judicial power, or a court wherein several matters were determinable, as 1. *Appeals* of death or murder committed beyond seas, according to the course of the civil law. 2. *The rights of prisoners* taken in war. 3. *The offences and miscarriages of soldiers*, contrary to the rules and orders of the army, for always preparatory to an actual war, the kings of this realm, by advice of the constable and marshal, were used to compose a book of rules and orders, for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law: we have an extract in the black book of the admiralty, and elsewhere, several exemplars of such military laws, especially that 9 R. 2. composed by the king, with the advice of the duke of Lancaster and others. *Ha. Hist. Law* 38, 39.

Derived from the crown.

7. The jurisdiction exercised in these courts (and indeed in all other courts governed by the civil or common law) are derived from the crown of England. And the last devolution is to the king by way of appeal. *Ha. Hist. Law* 43.

How they proceed.

8. In this military court, whether, 1. of honour, or 2. court martial, the civil law has been used and allowed in such things as belong to their jurisdiction, as the rule or direction of their proceedings and decisions, so far as they are not contrariant to or contradicted by the laws of the kingdom, and those customs and usages which have obtained in England, which even in matters of honour are in some points derogatory to the civil law; but this court has been long disused upon great reason. But though in these courts the civil law has been under such restrictions, as aforesaid, allowed, yet herein, the common law of England has retained those *signa superioritatis*, and the preference and superintendancy in relation to those courts, and these are but *leges sub graviore lege*, for the honour of the king and the common law: and so it is also, that the common law, and the judges at law have the exposition of all such statutes or acts of parliament as concern the extent of the jurisdiction, or those matters depending before those courts, &c. *Ha. Hist. Law.* 41, 42, 43.

408. *Quod non habet principium, non habet finem.*

1. **I**T is good policy to name the bishop in a *quare impedit*, because in such case he shall not present by lapse; and as he shall not, so shall not the metropolitan, for he shall never present or collate by lapse after the six months, but when the immediate ordinary might have collated by lapse within the six months, and had surceased his time: and so it is if the time be devolved

to the king, for the first step or beginning faileth; and in human things, *quod non habet principium, non habet finem.* Co. Lit. 334. b. 345. a.

2. Rules, *Nullum tempus occurrit regi. Pendente lite nihil innovetur.*

409. *Quod per me non possum, nec per alium.*

RESOLVED, That custom hath so established and fixed the estate of the copyholder, that by the severance of the inheritance from the copyhold of the manor, the copyhold is not destroyed; for that the lord cannot oust the copyholder nor any other claiming under him, *nemo potest plus ad alium transferre, quam ipse habet; et quod per me non possum, nec per alium.* 4 Co. 24. b.

410. *Quod prius est dignius est.*

1. **I**F there be three brethren, and the second purchaseth lands in fee-simple, and dieth *sans* issue, the eldest brother shall have the land by descent and not the younger, &c. So of the younger purchasing and dying in like manner; for the eldest is most worthy of blood, &c. *Lit. sect. 5.*

2. It is a maxim in the law, That *the next of the worthiest blood shall ever inherit*, as the male and all descendant from him before the female, and the female of the part of the father before the male or female of the part of the mother, &c. because the female of the part of the father is of the worthiest blood; and therefore among the males, the eldest brother and his posterity shall inherit lands in fee-simple, as heir, before any younger brother, or any descending from him; because, as *Littleton* saith, he is *plus digne de sanke. Quod prius est dignius est, et qui prior est tempore potior est jure. Si quis plures filios habuerit, jus proprietatis primo descendit ad primogenitum, eo quod inventus est primo in rerum natura, &c.* Co. Lit. 14. a.

3. Rule, *Propinquior excludit propinquum, &c.*

411. *Quod quisquis norit, in hoc se exerceat.*

1. **I**T was resolved by Sir *Edward Anderson* lord chief justice, and all the justices of the common pleas, That the verdict found in the case at bar was well found. They held that all pleas, as well of the crown as common pleas, *viz.* actions real, personal and mixt, and upon all issues joined, whether between the king and the party, or between party and party, the jurors might find the special matter, which is pertinent and tends only to the issue joined; and they doubting in point of law, may well pray the advice of the court; and that by the common law, which hath ordained, that matters in fact should be tried by the jurors, and matters in law by the judges: and as *ad quaestionem facti non respondent judices, ita ad quaestionem juris non respondent juratores*, but their office is to find *veritatem facti*, and to refer the discussion of the law to the judges; and therefore their finding is called *veridictum, quasi dictum veritatis*, the saying the truth; and the censure of the judges is called *judicium, quasi juris dictum, ipsa viva vox juris*, the saying of the law. And the wisdom of the law was to refer things to persons who were cognizant of, and expert

in them, according to the antient rule, *quod quisquis norit, in hoc se exerceat*; and therefore the law will neither compel the jury, who have not knowledge in the law, to take upon them the cognizance of points of law, whether in the cases concerning life, member, inheritance, freeholds, goods or chattels, but to leave them to the consideration of the judges: neither are the justices of assize, nor any other judges, whether in pleas of the crown or common pleas, to put points of law upon the jurors, but they are to have the truth of the case, or matter of fact found for them, and upon conference and consideration to judge according to law in such cases, &c. 9 Co. 13. a.

2. Matters in law shall not be put in issue to be tried *per pais*; for the rule is, *quod quisquis norit, in hoc se exerceat*; and therefore *sicut ad quaestionem facti non respondent iudices, ita ad quaestionem juris non respondent juratores*: and if the jury take upon them the knowledge of the law, and find the special matter, but mistake their law, the judges ought to give judgment upon the special matter according to law, without any regard had to the conclusion of the jury, who ought not to have taken upon them judgment of law. 11 Co. 10. b. and herewith accord *Plow. Com. Amy Townsend's case.* 5 H. 7. *Carew's case.* 9 H. 6. 38. 13 H. 7. 22, &c. and Lord Berkley's case, *Plow. Com.* 230.

3. References, 12 Co. 67. 9 Co. 13. Co. Lit. 125.

4. Rule, *Sicut ad quaestionem juris non respondent jur'*, &c.

412. *Quod semel placuit in electionibus, amplius displicere non potest.*

1. ONE grants, by deed, a rent-charge to another, and the rent is behind; the grantee may have a writ of annuity or distress at his election, but he may not have both; for if he bring annuity the land is discharged; and if he distrain, and the tenant bring his replevin, as he may, and the grantee avers in a court of record, then the person is discharged. Co. Lit. 146. a.

2. References, 2 Chan. Ca. 24, 87, 200. 1 Vern. 103, 105, 298, 471. 2 Rep. Chan. 2, 9, 21. Gilb. 183. Barn. 39, 278, 391.

3. Rules, Every man's deed or covenant to be taken most strongly against himself. In things of election, he who is to make it, is to shew that he hath made it.

413. *Quod tacite intelligitur deesse non videtur.*

1. THE judges in all successions of ages have allowed copyholds to be established, and sure by custom, and to be descendible as other estates are. 4 Co. 22. a. Co. Lit. 63. a.

2. And it was resolved, That when custom hath created such inheritances, and that the lands shall be descendible, then the law directs the descent according to the rules and maxims of the common law, as incidents; *quia quod tacite intelligitur deesse non videtur.* As 5 E. 4. 7. When uses had gained the reputation of inheritances descendible, the common law directed their descent; as that there should be *possessio fratris* of an

an use, as well as of an inheritance at law. But it was resolved, that such customary inheritances should not, by law, have any other collateral qualities, which do not concern descent, as other inheritances at law have; for as *sans* custom such estates are not descendible, so, without custom, they may not have any collateral quality incident to inheritances at law; for they are but inheritances *secundum quid*, viz. to be descendible by custom, to their heirs, and not to be determined by their deaths, nor subject to the will of the lord, like other estates at will; yet they are not inheritances *simpliciter*, to have all other collateral qualities, but only such as custom hath allowed, &c. 4 Co. 22. a. b.

414 *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.*

RENT granted out of the manor of *D.* and if the rent is behind, that the grantee shall distrain for the rent in the manor of *S.* this is but a penalty in the manor of *S.* &c. Co. Lit. 147.

415. *Ratio est anima legis.*

1. **A**MONG all the gifts God gave to man, reason is the noblest, for thereby man not only excelleth beasts, but is made in dignity like to the angels, discerning truth from falsehood, and good from evil; and therefore reason is the power of the soul that discerneth between good and evil, and between good and better, comparing the one with the other; the which also sheweth virtue loveth good and fieth vice. And reason is called righteous and good; as it is conformable to the will of God, which is the first thing and first rule that all things must be ruled by, &c. Doct. & Stud. lib. 1. cap. 14. This law of reason may not be changed or put away, cap. 2. and is the first ground of the law of England. cap. 5.

2. Rules, *Constructions to be with equity and moderation. Therefore to moderate the rigour of the law. Lex plus laudatur quando ratione probatur. Ratio est radius divini luminis.*

416. *Ratio est radius divini luminis.*

1. **Q**UIA per rationes pervenitur ad legitimam rationem, says Littleton, sect. 377. for *ratio est radius divini luminis*, and by reasoning and debating of grave learned men the darkness of ignorance is expelled; and by the light of legal reason the right is discerned, and thereupon judgment given according to law, which is the perfection of reason. This is by Littleton called *legitima ratio*, whereunto no man can attain but by long study, often conference, long experience, and continual observation. And certain it is, says lord Coke, that in matters of difficulty, the more seriously they are debated and argued, the more truly they are resolved, and thereby new inventions justly avoided. Co. Lit. 232.

2. Rules, *Equity cannot change things, nor make them act contrary to their essential natures and properties. Has a power upon circumstances, to relieve, &c. Looks upon that as done which ought to be done. Is to execute the intention*

tention of the parties. Rectifies mistakes, and supplies defects. Regards substance, not ceremony. To prevent multiplicity of suits. Will never decree a suit where it may decree a remedy. Will not relieve where no fraud or covin. Will not aid new inventions, &c. Relieves against accidents. Against fraud. Where the matter lieth in compensation. Against one's own act, &c.

Law and equity both shall prevail against equity only. Driveth no man to shew what he doth not know. Favours justice, &c. Life, liberty and dower. The public quiet. Hath always suppressed new and subtle inventions in derogation of the common law. Is the perfection of reason. Prefers the public good. Regards the intent. Requireth order and decency. Respecteth the excellency of some persons, Time. Tendereth the weakness and imperfection of men. Will rather endure a particular mischief, &c. Will not suffer wrong.

Lex necessitatis est lex temporis. Nihil facit frustra. Non cogit ad impossibilia. Spectat naturae ordinem.

Liberty the greatest jewel. *Ratio legis est anima legis. Summa charitas est facere justitiam, &c. Summa ratio est quae pro religione facit. Summum jus summa est injuria.*

417. *Ratio legis est anima legis.*

1. **T**HE outward words of the law are not the law, but the inward sense and meaning thereof; for our law, as all others, hath two parts, flesh and soul, the letter resembleth the flesh, and the intent and reason the soul; *Nam ratio legis est anima legis.* 2 West's Prec. 176. a. b.
2. See Two last rules, and the rules referred to there.

418. *Recovery in one action, a good bar to another of equal or more base nature, but not to one of more high nature.*

THE rule of law is, That recovery or bar in one action is good in another action of either an equal or inferior nature, but not in actions of higher nature. As a recovery or bar in one assise is good in another. 44 E. 3. 45. 9 H. 7. 13, &c. But not in a Mortdancer. 5 Ass. pl. 1. Neither is a recovery or bar in a Mortdancer a good bar in a writ of right. Fitzb. Nat. Brev. 5, 50. Ass. pl. 15. 11 E. 3. Entre 56, &c. 4 Co. 43.

419. *Refert a quo fiat perquisitum.*

1. **R**Eference, Co. Lit. 12. a.
2. Rule, He to inherit must be of the blood of the first purchaser.

420. *Reges (sacro oleo uncti) spiritualis jurisdictionis sunt capaces.*

The royal supremacy.

General to.

1. **T**HE king's immediate, personal, originary, inherent power which he doth or may execute *authoritate regia supremâ ecclesiasticâ*, as king and sovereign governor of the church of *England*, is one of those flowers, *quæ faciunt coronam*, which makes the royal crown and diadem in force and virtue; whilst the power given to the archbishop or dean and chapter, by the statute of *Dispensations* and *Faculties*, is but *authoritatem ordinariam, limitatam et delegatam*. Hob. 143.

What the king may do in virtue thereof.

2. The king may constitute appropriations, unite churches, erect ecclesiastical benefices, or dignities, dispence with irregularities, exempt from ecclesiastical jurisdiction, and the execution of their sentences; he can suspend the effect of their sentences, even in causes criminal. *Ha. Anal.* 19.

3. He hath both ecclesiastical and temporal jurisdiction. *5 Co. De Ju. Regis Eccl.* 28.

4. He may dispence with the ecclesiastical laws. *Hob.* 140. *Colt and Glover's case.* *Palm.* 470. *Mo.* 755. *1 Ju. Eccl. tit. The King supreme.*

5. The king of *England*, who is, and always was of right, the fountain of all justice and jurisdiction in all causes, whether ecclesiastical or civil within his dominions, though he allows prelates to exercise jurisdiction, yet he hath the superintendancy of their proceedings, and the power of directing when, and how they shall proceed, and of restraint and correction if they do not proceed duly, as is evident from the writs of several natures directed to bishops, &c. whereby he commands them, &c. *Da.* 51. b. 52. a.

6. References, *Stat.* 25 E. 3. 16 R. 2. 2. 25 H. 8. 1 E. 6. 1 Eliz. 1. *Cro. Eliz.* 599. *Da.* 4. *1 Ju. Eccl. tit. King supreme head of the church.*

7. Rule, *Omnes reges dicuntur clerici.*

421. *Regula peccatis quæ paenas irrogat æquas.*

THIS was an action of trespass for taking away two steers. To which the defendant pleaded, That *William Morgan* was seised of the manor of *Brecon* in his demesne as of fee, and that he and all those, &c. had time, &c. a court leet, or view of frankpledge three times a year, viz. on *Monday* next after the close of *Easter*, on *Monday* next after the feast of *St. Michael*, and on *Monday* next after *St. Hilary*. That in this manor there was a custom, that every tenant of every freehold tenement within the said manor, used and ought to appear personally, without any notice or summons, once in every year, at one of the said three courts of view of frankpledge, so to be held; and if he did not appear at the two other courts, then he was to pay the steward for the use of the lord of the manor an essoign penny for each of the said two courts for his default; and that every such tenant not appearing at either of the said three

courts, was to be amerced by the steward for his default 7 s. for each of the said three courts; and that every tenant, being lawfully summoned to appear, and inquire and present upon oath all such matters as ought to be inquired into and presented, and therein making default, was to be amerced by the steward for his contempt at 7 s. and that the bailiff of the said manor, by warrant of the steward, should levy these amerciaments by distress and sale of the goods and chattels of the defaulters. And the defendant further says, that *John Edwards* the plaintiff, then and for three years before was tenant, &c. and that there was a court held on *Monday* next after the close of *Easter*, &c. and that the plaintiff was lawfully summoned to appear, and to be put upon the jury, &c. and that he did not appear, for which he was amerced by the steward at 7 s. and so on the second and third court, &c. for which he was amerced in another 7 s. and another 7 s. and for not paying those several amerciaments, the steward directed his writ to the four persons named, and which was delivered to them, by virtue whereof they took the said two steers, in the declaration mentioned, as a distress and levied on the said steers the said several sums, amounting to 1 l. 8 s. to the use of the said *William Morgan*, &c. and had sold the same, &c. and paid the said 1 l. 8 s. to the said *William Morgan*, and were ready and offered to pay the overplus to the plaintiff, which he refused to receive, which is the same transgression of which the plaintiff complains. The plaintiff replies *De injuria sua propria*, whereto the defendant demurs. The question in this case is, Whether the custom be good? And we are of opinion that this custom is not good, for many reasons. 1. Because this custom is not affected. By *Stat. Magna Charta*, cap. 14. it is directed expressly, that *nulla praedictarum misericordiarum ponetur nisi per sacramentum proborum et legalium hominum de vicineto*; and 27 H. 8. cap. 26. all laws and statutes in *England* are to run in *Wales*; and so if this custom be against *Magna Charta*, it is as much abolished in *Wales* as it is in *England*. The statute of *Magna Charta* was intended to take away all fines and amercements at the will and pleasure of the lord and his steward, and also all excessive fines and amercements, if they were never so certain: for before this charter of liberties, the lords used to set such excessive and grievous amerciaments on their tenants, that under pretence of such amerciaments they used to seize the whole profits of the tenement which they had granted; to hinder which oppression, *Magna Charta* appoints, that every amerciament should be affected. This has been so understood, that though a court may award that the party shall be amerced, yet the quantity of the amerciament is to be settled by the affecters; because they do affect, or bring in the quantity of the amerciament. In a court baron where the suitors are judges, the homage may present the defaults on small trespasses within the manor, but the amerciament must be afterwards particularly affected by the affecters. *Hob.* 129. and *Kitchin* 153. says, That the office of the homage and that of the affecters are not to be confounded; the homage are to present the little offences, and trespasses within the manor, as *Kitchin* says; but the affecters are in nature of trustees, to settle the quantity of the amerciament. Indeed *Hob.* goes so far as to say, That the homage may set a sum upon the offence, but then the affecters are so to mitigate it, that the quantity of the amerciament is totally to be settled by the affecters; and so in the courts above, where amerciaments were ordered either against
plaintiff

plaintiff or defendant, they were carried down to the coroner to be settled and affeered. In a court leet, which was a court of record, if an amerciamment imposed was affeered even by the jury, and not by sworn affeerers appointed for that purpose, it was a void amerciamment, and the lord of the leet could not maintain his action for it. 3 Lev. 206. It is very reasonable there should be such an affeement; for in this very case it is very possible the tenant might not have been summoned, and that this might come to the knowledge of the affeerers, and that would be an excuse for this default. Objection, This is an amerciamment in nature of a fine, and a fine may be set by a court without any affeement. Answer, It is true, a fine may be set without affeement; because it is out of the statute of *Magna Charta*; for the statute of *Magna Charta* doth not comprehend the cases where a court of justice may imprison, and where a fine is set by way of mercy, as a ransom and purgation of the offence; for the statute was designed in mercy to offenders, and not to hinder them from mercy; and so did not extend to offences that might be punished by imprisonment. So in all breaches of the peace, the court may set a fine, and so for all contempts; because the court may imprison. So a steward of a court leet may impose a reasonable fine, for a disturbance committed *in facie curiae*, which is *Griesley's case*, 8 Co. 39. And so he may if a suitor will not be sworn of the homage, because he may imprison in those cases, as is expressly resolved in *Fitzb. Abr. tit. Leet, N. 4. Dalt. Sher. 400.* And when such a fine is imposed, it becomes a debt to the lord, for which an action of debt lieth. *Cro. Eliz. 581.* No body can say, that a default for not appearing in a court leet, is such a default, upon which a steward may imprison the party; and so he cannot set a fine as a ransom from imprisonment; but it is said that this may be good by custom: now as to that, it is in the very teeth of *Magna Charta*; for it is a custom to amerce without affeement, and this statute was made to abrogate and abolish such customs. 2. Another reason against this custom is, that the amerciamment is too excessive, it is not *salvo contenemento*: now if the amerciamment was so great as to sweep away the whole profits of the freehold of the offender, it was too great; as if he were a sock-man, and it extended to take away the beasts of his plough; if he were a military man, and it extended to take away his arms; if he was a merchant, and it extended to take away his merchandize; if he were a villain, if it took away his cart or wainage; all these amerciamentments were too grievous and against statute of *Magna Charta*, which says, *Liber homo non amercietur pro parvo delicto; nisi secundum modum illius delicti; et pro magno delicto secundum magnitudinem delicti, salvo sibi contenemento suo, et mercator eodem modo salva merchandiza sua; et villanus ulterius quam nostri eodem modo amercietur, salvo wainagio suo; si inciderit in misericordiam nostram.* And this makes an essential difference between a fine and an amerciamment; for an amerciamment is to be set, that he may sustain his station as feudatory to his lord; but the case of a fine has no relation thereunto; for where the offender is imprisoned, he cannot sustain that station; this case is among the *minora delicta*, and as such, there should be only an amerciamment, and that reasonable; but according to the custom, it may happen, that the amerciamment may sweep away the whole profit of the tenement; for a man who has but a rod of land, or tenement of 5 s. a year, must be obliged to pay 1 l. 8 s. for his default.

Lord

Lord Coke in 2 *Just. fo.* 28. expounds the words of the Stat. in such a manner, *that the amerciamment must not destroy the livelihood of the offender*; but such amerciamentments as these in antient times would certainly have been thought very exorbitant before the quantity of the money was so very much increased; and even at this day, the fine would swallow the annual profit of a small tenement. 3. Another reason against the amerciamment here is, that it admits of no *essoign* to excuse the default. Now there are several *essoigns* that excuse even an appearance at the king's courts upon demand, as the *essoign de malo lecti, de malo veniendi, de servitio regis, &c.* But if a man were summoned at this court, and were taken ill the day before the leet, or sent for into the king's service, it was to be no excuse, but immediately the amerciamment was to run upon him, which is against reason, as these *essoigns* excuse these defaults: but by this custom he is to be amerced even where the law excuses his non-appearance. 4. It is not *secundum modum delicti*; because the non-attendance of a poor man or day labourer is a less fault, than of a rich man that has his time to command; and the statute was made on purpose to proportion punishments to the default: but this custom runs alike upon all defaults, small and great. This is contrary to that known rule, *i. e. Regula peccatis quae paenas irrogat aequas*. Objection, though this cannot be maintained as an amerciamment, yet it might begin by tenure, and the lord might settle what sum he pleased, on the making default at his leet, and such sum ought not to be reckoned excessive, and subject to *affeerment*, because it was settled in the original settlement of the tenure. Answer, 1. This is pleaded as an amerciamment for a default, and not as a sum due by tenure; *and we must take it as it was pleaded*, and not by any imagination out of the plea. 2. *If it were due by tenure, it must be laid upon the lands and tenement in certain*, and not personally upon the tenant, because upon the contingency it will be a sum issuing out of the land. 3. This would never grow into a custom; because upon an alienation of part of the land, or any division of the same upon descent, the sum must be divided, and could not be the same intire and uniform sum. This was the opinion of the court, delivered by lord chief baron Gilbert. *Gilb.* 209, 210, 211, 212, 213.

422. Remainder can depend upon no estate but what beginneth at the same time that the remainder doth.

1. **I**F a man make a lease to another for term of life, and after of his meer motion he confirmeth his estate for term of his life to remain after his death to another, and to his heirs; in this case the remainder is void in law and conscience; *for by the law there can no remainder depend upon any estate, but that the same estate beginneth at the same time that the remainder doth.* And in this case the estate began before, and the confirmation enlargeth not his estate, nor gave him a new estate. *Doct. & Stud. lib. 2. c. 20.*

2. But if a lease be made to a man for term of another's life, and after the lessor, only of his meer motion, confirmeth the land to the lessee for term of his own life, the remainder over in fee, this is a good remainder in law and conscience. *Doct. & Stud. lib. 2. c. 20.*

3. References, *Co. Lit.* 21, 54, 264, 298, 299, 353, 378. *Palm.* 50.

423. Remedies to be reciprocal.

1. **A** MAN being seised in fee makes an absolute conveyance to the defendant, but by another deed of the same date, the lands were made redeemable on payment of 1000 *l.* and interest at any time during the life of the grantor, and in case he should not redeem in his life-time, then he covenants that the same should never be redeemed: the grantor dies without redeeming. The heir exhibits his bill to be let in to redeem. It appeared in the proof, that the mortgagor had a kindness for the mortgagee, and that this was by way of settlement. Decreed by lord chancellor *Nottingham*, an account and redemption, but reversed by lord keeper, and the original bill dismissed. 1 *Vern.* 7, 8. [See same report, *Cade's case*, 212, and 217.

2. The lord keeper in this case said, that he was fully satisfied that it was not originally a mortgage, but an absolute purchase, but believes *Sabine* might complain he had sold his estate too cheap, and that thereupon serjeant *Barrel* might declare, that if he would pay his money within a year, and 100 *l.* for his pains, that he might have his estate again; and cited *Sir Anthony Cope's case* of a clause to repurchase, which made so much stir in *Westminster Hall*; and said where there was a clause or provision to repurchase, that the time limited ought to be precisely observed. And as to the serjeant's agreement, it was but reasonable for his trouble; and for that the estate was more valuable, as having gone through a lawyer's hands who understood the title; and that might be a means to encourage purchasers, and dismissed the bill. 1 *Vern.* 268.

3. References, 1 *Ch. Ca.* 1, 2, 48, 86, 87, 202, 209, 302. 1 *Rep. Ch.* 122, 123. 2 *Rep. Ch.* 58, 159, 247. 1 *Vern.* 192, 215.

4. Rule, *Quando lex aliquid alicui concedit, &c.*

424. Remoto impedimento emergit actio.

1. **B**ETWEEN *William Paget, Esq;* plaintiff and *Edward Cary* and *Elizabeth* his wife defendants *in waste*. It was resolved in *C. B.* That if tenant for life be, remainder for life, remainder in fee; if tenant for life do waste in the trees, and after he in remainder for life die, yet the action is maintainable for the waste done in the life of him in remainder for life, for it was to the disinherison of him in remainder in fee, and now the impediment (which was the mesne estate for life) is tolled; *et remoto impedimento emergit actio*; and as it was there said, so it was adjudged. *Anno 9 Eliz. Reginae.* 5 *Co.* 76. *b.*

2. And the law is the same, if he in remainder for life, after the waste, surrender to him in reversion or remainder in fee. And whereas it was objected, that at the time of the waste, it could not be said to the damage of him in remainder in fee, because of the mesne estate for life. To this it was answered and resolved, that when the trees are severed they are the property of, and belong to him in remainder in fee; and so it is where some of the books have said, that he in remainder or reversion in fee, should not have waste, they must be understood, during the continuance of

the mesne remainder; and where it is said in other of the books, that an action of waste lieth, they must be taken to mean, after the death of him in remainder for life. *Quia cum aliquid impeditur propter unum, eo remoto, tollitur impedimentum*; and so all the books are well reconciled. 5 Co. 76. b. 77. a.

3. Bootbe brought waste against Skevington, and declared that Sir William Bootbe demised for life to Enfor, who assigned to Skevington; the defendant pleaded an assignment to Elizabeth Cave, before which no waste was; the plaintiff replied, and shewed the Stat. 11 H. 6. c. 5. and that the grant to Cave was to the intent, that they should not know against whom to bring their action, and averred that he took the profits. The defendant rejoined that Cave granted to A. who demised to the defendant at will, without that, &c. whereupon the plaintiff demurred in law, and in this case three points were resolved. 1. That though the words of the act are, that where tenant for life or years have demised or granted away their estate, with intent that they in reversion, *scil.* their lessors, their heirs or assigns, should not know their names, and yet the first tenant continues the occupation of the lands, and commits waste, &c. it is ordained and established, that he in reversion shall maintain waste against such tenants for life or years, and there is provision for the first tenants; yet it was resolved, that every assignee from the first lessee, whether mediate or immediate, is within the act; *for it was made to prevent and suppress fraud and deceit; and therefore must be taken beneficially.* 2. It was resolved, that he in remainder is within the said act, as well as he in reversion; *for that he is in equal mischief*, and yet both the preamble and body of the act speak only of him in reversion. 3. It was resolved, that the intent aforesaid was not traversable in the present case, but the taking the profits, which is a thing notorious, and whereof the country might have cognizance; and the taking the profits implies the intent. *Vide* 4 H. 7. 9. also 4 E. 4. 29. and many other books which agree herewith. 5 Co. 77. a. b.

4. References, 11 E. 3. *Receit*, 118. 4 E. 3. 18. *Cole's Ca.* 33 E. 3. *Wast.* 114. 5 E. 3. 3. 10 E. 4. 9. *Regr.* 74. b. *and the note there, fo.* 75. *Co. Lit.* 53. b. 54. a. 220. 4 Co. 62. 11 Co. 48, 81. *Dy.* 90. 1 Cro. 243. 2 Cro. 688. *Mo.* 18.

425. *Repellitur a sacramento infamis.*

Propter delictum, As if the juror be attainted or convicted of treason or felony, or for any offence to life or member, or in attainr for a false verdict, or for perjury as a witness, or in a conspiracy at the suit of the king, or in any suit, (either for the king, or for any subject) be adjudged to the pillory, tumbrel, or the like, or to be branded, or to be stigmatized, or to have any other corporal punishment, whereby he becometh infamous; for it is a maxim at law, *repellitur a sacramento infamis.* These and the like are principal causes of challenge. So it is if a man be outlawed in trespass, debt, or any other action; for he is *exlex*; and therefore is not *legalis homo*. And old books have said, that if he be excommunicated, he could not be of a jury. *Co. Lit.* 158. a.

426. *Reputatio est vulgaris opinio, ubi non est veritas.*

What.

1. **NOTE**, *Lecteur*, The rule is, *Quod reputatio est vulgaris opinio, ubi non est veritas.* 4 Co. 107. b.

The sorts.

2. *Et vulgaris opinio est duplex, scil. opinio vulgaris orta inter graves et discretos, et quae vultum veritatis habet; et opinio tantum orta inter leves et vulgares homines absque specie veritatis.* 4 Co. 107. b.

Particular cases.

Of colleges, chauntries, &c. where given to the king.

3. It was resolved, That colleges or chauntries in reputation, though they wanted sufficient foundation and incorporation in law, yet were given to the king by the act 1 E. 6. for it was the intent of the makers of the act to toll all superstition out of the minds of men, &c. and superstition was as well maintained in reputative chauntries, as in others; and yet it was not within the letter of the act; for in judgment of law it was not a college or chauntry; for *reputatio est vulgaris opinio, ubi non est veritas.* 4 Co. 106. b. Dy. 368. a. b.

Where not given to the king.

4. But where there is a college or chauntry only in vulgar reputation, *sans* any commencement or countenance of lawful foundation, or erected by such means which could not possibly be a lawful foundation, there such college or chauntry is not given to the king by this act, &c. 4 Co. 107. b.

427. *Rerum ordo confunditur, si unicuique jurisdictio non servetur.*

1. **A**S the body of man, says lord Coke, is best ordered when every particular member exerciseth its proper duty; so it is of the commonwealth, it is best governed when every several court of justice executeth its proper jurisdiction, &c. If one court should usurp or incroach upon another, it would introduce uncertainty, subvert justice, and bring all things in the end to confusion; *rerum ordo confunditur, si unicuique jurisdictio non servetur.* Proem to 4 Inst.

2. This kingdom hath been best governed in peace, and quiet preserved, when both temporal and ecclesiastical courts and judges have kept themselves within their proper jurisdictions, without incroaching or usurping one upon another; and where such incroachments and usurpations have been made, they have been the seeds of great trouble and inconvenience, &c. 4 Inst. 321.

3. For

3. For the dismal effects of church encroachments, &c. see 1 Ju. Eccl. the course thereof, &c. 2 Ju. Eccl. 15, 266, 349. See also 1 Ju. Eccl. tit. How ecclesiastical courts restrained, &c.

428. *Res est misera, ubi jus est vagum.*

BY lord chief justice *Holt*, the house of lords have no jurisdiction over an original cause mixt with matter of fact. 1. Because that the supreme court is the dernier resort; as well as that it is beneath the dignity of so supreme a judicature to try a matter of fact: wherefore error in fact in *C. B.* must, of necessity, be redressed before the judges of this court. 2. If the parliament should take cognizance of original causes, the subject would lose his appeal, *so much indulged by common law in all cases.* Causes come not to parliament till they have tried all other judicatures: for this reason, within these four years, judgment being given against the earl of *M. in Scac'*; he brought error in parliament; and the question was, Whether by 31 *Eliz.* the exchequer-chamber should not interpose? And the writ was abated, and it was held that the exchequer-chamber should interpose. And his lordship said further, no precedent, in the principal case, hath been shewn to warrant the determining inheritances originally *per legem parliamènti.* If it be so determinable, it must be by act of parliament, but there is no such act; or by custom; but there is no such custom; but if inheritances were determinable in parliament, without their having jurisdiction, they would have uncontrollable power; *et res est misera, ubi jus est vagum.* Salk. case *Rex et Regina* versus *Knollys.*

429. *Res inter alios acta alteri nocere non debet.*

1. **R***ES inter alios acta alteri nocere non debet, et factum unius alteri nocere non debet,* are true rules with this exception, unless an inconvenience should follow; for *lex citius tolerare vult privatum damnum, quam publicum malum*; and an argument *ab inconvenienti* is forcible in law. *Co. Lit.* 152. b.

2. Rules, One may not be prejudiced by the act of a third person. Law will rather suffer a mischief, than an inconvenience. *Volenti non fit injuria.*

430. *Res judicata pro veritate habetur.*

1. **W**HEN a matter hath received the sanction of a judgment or decree on its side, the presumption is, that it is right; for *res judicata pro veritate habetur*; as when our judges or courts of law acknowledged the pope head and grand sovereign from whom all ecclesiastical persons had their power. And *Therning* in particular called him *Apostle*; so that his ecclesiastical acts were allowed lawful; so upon clearing the king's supremacy, when the clouds of ignorance were dispersed, the consequence of his authority was as clearly declared, &c. *Hob.* 147.

2. References, *Co. Lit.* 39. a. 236. b. 103. a. 4 *Co.* 70.

431. *Restrictions of redemptions of mortgages discountenanced in equity.*

1. *H.* Mortgaged lands, provided that he himself, or the heirs male of his body, might redeem. Yet decreed that the assignee should redeem. *Once a mortgage and always a mortgage.* 1 Vern. case 31. *Vide* case 6.

2. References, 1 Vern. 7, 190, &c. 214, &c. 394, &c. 2 Rep. Chan. 147.

3. Rules, Remedies to be reciprocal. *Once a mortgage and always a mortgage.*

432. *Rex est caput et salus reipublicae.*

*I*N some cases a *non compos mentis* may commit high treason; for the king is *caput et salus reipublicae*, et a capite bona valetudo transit in omnes; and therefore the persons of the kings are so sacred, that none may offer them violence, but he is *reus criminis laesae majestatis: et pereat unus ne percant omnes*; but *non compos mentis* may not commit petit treason. 4 Co. 124. b.

433. *Rex est mixta persona cum sacerdote.*

*R*ESolved that proxies, being in their original nature duties payable for visitation, were grantable to the king, and he capable of such grants, especially since they have been converted into certain sums of money in the nature of a pension or annuity; for by the antient law of *England* the king hath power to visit, reform and correct all abuses and enormities in the church; and by the statute *H. 8.* the crown was but remitted and restored to its antient jurisdiction which had been usurped by the bishop of *Rome*. *Reges sacro oleo uncti spiritualis jurisdictionis sunt capaces.* And proxy is a profit of jurisdiction; *rex est mixta persona cum sacerdote*; also he may have tithes by the common law, which is a matter of which no lay person was capable; he may visit his free chapels and hospitals. *Omnes reges dicuntur cleri*; and *causa spiritualis committi potest principi laico.* Da. 4. a.

434. *Rex est monarcha et imperator in regno suo.*

1. *REGES absoluti habent imperium, et dici possunt imperatores; et rex angliae est monarcha et imperator in regno suo.* *Rex angliae est absolutus monarcha; et absolutum habet imperium.* *Rex plenitudine potestatis* might create a county palatine with *jura regalia*, which consist of these two things or principal points. 1. Royal jurisdiction. 2. Royal feignory, &c. *Da. le case del countie palatine, &c.* The king is head of the commonwealth immediately under God; and by his taking the crown, all attainders of his person are purged, without any reversal; he cannot be a minor; in him is no imperfection, negligence, laches or folly; he can do no wrong; it is his prerogative to make war and peace; to coin and give

foreign coin its value, by his royal proclamation without parliament; he is the fountain of honour; all jurisdiction is from him; he is supreme ordinary, supreme patron, head of the church, and his prelates but his ministers; he is guardian of idiots, &c. he has all mines of gold and silver; he calls, continues and dissolves parliaments; he is supposed present in all his courts; all lands are holden of him; all franchises are derived from him; all escheats and forfeitures of all lands and franchises belong to him; also all deodands, treasure trove of gold and silver, estrays, waifs, and goods and chattels of all felons and fugitives; he hath also all royal fish, white swans not marked which have gained their natural liberty; he is not to be supposed ignorant or misconfiant of the law; he is not bound by acts of parliament, unless either expressly named, or the cause of religion, charity or the public good be concerned; in a word he hath a prerogative in all things that are not injurious to the subject; yet this plenitude of power comes all from the law; for,

2. The law is to the king, as the king is to the law; *lex regi quod rex legi*. As the king upholdeth and maintaineth the laws, privileges and rights of the land, so the law keepeth men in subjection and obedience to the king, and thereby giveth glory and safety to the king, with peace and dignity to the kingdom. *Mason's Reasons Monarch.* 8vo. p. 126.

3. *Bract.* also, *Rex sub nullo nisi tantum sub deo et lege*. Acts of justice the king may not, nay he cannot put off, as says lord *Hobart*, *Cessa regnare, si non vis judicare*. The king is never supposed in law to be ill affected, but abused and deceived; for *eadem praesumitur mens regis, quae est juris*, &c. *Hob.* 155.

4. *Rex quod injustum est facere non potest*. *Jenk.* 325, margin. *Co. Lit.* 19. a. *Doct. & Stud.* lib. 1. cap. 8. for he governs by law. *Co. Lit.* 232.

5. *Rex non potest fallere, nec falli*. *Jenk.* 48. 4 *Co. Bozoun's case.* 12 *Co.* 3. *Co. Lit.* 98. b. 99. a.

6. *He can do no wrong*; for he is the fountain of justice and common right, and God's vicegerent. 11 *Co.* 72. a. *Bracton* hath it, *Nil aliud potest rex in terris, cum sit dei minister et vicarius, quam quod de jure potest; et paulo post: itaque potestas juris sua est, non injuriae; et (observe bien) cum sit autor juris, non debet inde injuriarum nasci occasio, unde jura nascuntur*. 11 *Co.* 74. a. For law is the perfection of reason, a ray of the divine mind, and cannot be the author of wrong, &c.

435. *Rex est persona mixta, medicus regni, pater patriae, et sponsus regni.*

1. **R**Eferences, 11 *Co. Magdalen College's case.* *Da.* 4. a. *Ha. Hist. Law.*

2. Rules, *Omnes reges dicuntur clerici. Rex est mixta persona cum sacerdote. Summa est ratio, quae pro religione facit. Charitas est facere justitiam. Rex est monarcha et imperator in regno suo.*

436. *Rex non debet judicare sed secundum legem.*

THE king submits himself to the law ; for *Bracton* saith, *quod non debet judicare sed secundum legem* ; and his prerogative is so excellent, that he cannot take a part with any thing, but by matter of record, neither can he draw the right or possession of any one in question upon a bare surmise, but by office or other matter of record ; for a record always carries credit with it. Poph. 26.

437. *Rex non debet esse sub homine, sed sub deo et lege.*

1. R Eferences, 12 Co. 65. *Bract.* 7.
2. Rules, *Rex est monarcha, &c. Rex est mixta persona, &c.*

438. *Rex non potest fallere, nec falli.*

General.

1. H E is not to be supposed misconusant of the law. *Co. Lit.* 99. a.

Particular cases.

2. And therefore when he licenceth expressly to alien to an abbot, &c. which is in *Mortmain*, he need not make any *non obstante* of the statute of *Mortmain* ; for it is apparent to be granted in *Mortmain*, and the king is the head of the law ; and therefore *praesumitur rex habere omnia jura in scrinio pectoris sui*, for the maintenance of his grant to be good according to the law, &c. *Co. Lit.* 99. a.

3. Though the queen's grant was *ex gratia speciali, certa scientia, et mero motu* ; yet this shall not extend the queen's grant against her intention and meaning expressed therein ; nor by any strained construction make any thing to pass against the apt and proper signification, or the main, common and usual sense of the words of her grant. 4 Co. 35.

4. Though the king or ordinary may suffer a church in lapse to stand void (which yet is *culpa*) however they cannot bind themselves that they will not fill the church ; for that were *injuria et malum in se* ; and therefore shall be judged in law, as deceit of the king ; for *eadem mens praesumitur regis, quae est juris*, &c. *Hob.* 154.

5. References, 3 Co. 1. 4 Co. *Bozoun's case.* 12 Co. 3 Co. *Lit.* 98. b. 99. a. *Jenk.* 48.

6. Rules, King can do no wrong. Neither grant, take, &c. but by matter of record. Is the fountain of justice. May not be supposed ignorant of the law. *Rex est monarcha, &c. Non debet judicare sed secundum legem.* And the next rule.

439. *Rex*

439. *Rex quod injustum facere non potest.*

General.

1. **T**HE king can do no wrong by his prerogative. 13 E. 4. 8.
 2. The king may disseise no man, nor no man him, nor pull any reversion or remainder out of him. *Doct. & Stud. lib. 1. cap. 8.*

Particular cases.

To the king's grant.

3. The king's grants are to be construed beneficially for his honour and relief of the subject, and not strictly to the subversion of such grants.

To bar others.

4. Before the statute *de donis*, if lands had been given to the king and to the heirs of his body, he could not, before issue had, have aliened in fee, but only to have barred his issue, as any common person might have done, but not to have barred the reversion; for that should have been a wrong in the case of a subject, and the king's prerogative cannot alter his case, nor make it greater than the donor gave unto him: and it is a maxim in law, *that the king can do no wrong.* Co. Lit. 19. b.

In matters of trust, &c.

As presentation by lapse, &c.

5. A lapse is an act and office of trust reposed by law in the ordinary, metropolitan, and lastly in the king, who is *certum et stabilimentum justitiae*; the end of which trust is to provide the church of a rector in default of the patron; and yet as for him and to his behoof; and therefore as he cannot transfer his trust to another, so cannot he devest the thing wherewith he is trusted to any other purpose; and therefore, as hath been said, though the king or bishop may suffer the church to stand void, yet they may not bind themselves not to fill it, as that were *injuria et malum in se*, and therefore to be adjudged in deceit of the king; for *eadem mens praesumitur regis*, &c. and if the ordinary, metropolitan or king himself, have not collated or presented by lapse, the patron may present, and the king or metropolitan can no where present but where the ordinary might; and even where lapse accrues to him or to any other to present by lapse, he is but as it were *negotiorum gestor*, or a kind of attorney, made by law, to do that for the patron, which it is supposed he would do himself, if there were not some let; and therefore the collation by lapse, is in right of the patron, and for his turn, and he shall lay it as his possession in an assise of *darreign presentment*, &c. Hob. 154.

6. Rules, *King can do no wrong. Rex est mixta persona*, &c. *Non potest judicare*, &c. *Fallere nec falli.*

440. Rights never die.

What, and general to.

1. *DE recto, rectum*, is a proper and significant word for the right which any hath; and wrong or injury is in *French* aptly called *Tort*; because it is wrested or crooked, being contrary to right and streight, &c. *Co. Lit.* 158. a.

2. *Jus*, or right, in general signification, includeth not only a right for which a writ of right lieth, but also any title or claim, for which no action is given by law, but only an entry. *Co. Lit.* 265. a. 345. a. b.

Yet may merge.

3. Estates in lands are properly merged or confounded when the lesser estate meets with the greater in the same person, and in the same right; as *terminus et feodum non possunt constare simul in unâ eademque personâ*. *Da.* 4. b. 5. a.

To the writs of right.

Wherefore so called, the sorts and nature, &c.

4. *Brief de droit, breve de recto*, are of two sorts. 1. A writ of right mentioned by *Lit. sect.* 234. which is the highest of all other real writs whatsoever, and hath the greatest respect, &c. and the most assured and final judgment; and therefore it is called a writ of *right right*, and in the old books *droit droit*, and this writ *est darrein remede de tous recoveries enter tous orders des pleas*, and the jury in this writ is called *magna assisa*, or *magna jurata*. 2. Writs of right in their nature, as the *rationabili parte*, and *ne injuste vexes*. *Co. Lit.* 158. b.

Never die.

General.

5. *Un droit ne poit pas morier; dormit aliquando jus, moritur nunquam*; for of such an high estimation is right in the eye of the law, as that it preserveth it from death and destruction; trodden down it may be, but never trodden out; for where it hath been said, that a release of right doth in some cases enure by way of extinguishment, it is to be understood either as *Littleton* doth *sect.* 478. in respect of him who makes the release, or in respect that by construction of law, it enureth not only to him to whom it is made, but to others also who are strangers to the release. *Co. Lit.* 279. *Da.* 4. b. 5. a.

Particular.

6. As if there be lord and tenant, and the tenant make a lease for life, the remainder in fee, if the lord release to the tenant for life, the rent is wholly extinguished, and he in remainder shall take benefit thereof; even so when the heir of the disseisor is disseised, and the disseisor makes a lease for life, the remainder in fee, if the first disseisee release to the tenant for life, this is said to enure by way of extinguishment; for that it shall enure to him in the remainder who is a stranger to the release, and yet in truth the right is not extinct, but doth follow the possession, *viz.* the tenant for

life hath it during his time, and he in remainder to him and his heirs, and the right of inheritance is in him in remainder; for a right to land cannot die, or be extinct in deed; and therefore, if after the death of the tenant for life, the heir of the disseisor bring a writ of right against him in the remainder, and he join the mise upon the meer right, it shall be found for him; because in judgment of law he hath, by the said release, the right of the first disseisee. *Co. Lit. 279. b. Da. 4. b. 5. a.*

441. Rights or titles to lands or tenements of inheritance or freehold, may not be barred by collateral satisfaction, but by release or confirmation, or other act which tantamounts.

Rule.

1. **T**HE rule of the common law is, that a right or title, which any one hath to any lands or tenements of any estate of inheritance or freehold, may not be barred by the acceptance of any sort of collateral satisfaction or recompence. *4 Co. 1. a.*

Particular cases.

2. As if *A.* disseise *B.* tenant for life, or in fee, of the manor of *Dale*, and after give him the manor of *Sale*, to him and his heirs, in full satisfaction of all his rights, and actions that he hath in or on account of the said manor of *Dale*, which *B.* accepts; yet he may enter into the manor of *Dale*, or recover the same in any real action; for a right or title of freehold, or inheritance, may not be barred by any collateral satisfaction, but by release or by confirmation, or other act which tantamounts; and therefore it is commonly said in our books, *That accord with satisfaction is a good plea in personal actions, where damages are only to be recovered; but not in actions real.* And this was the reason that no collateral satisfaction or recompence made a woman in satisfaction of her dower, was any bar thereto at law. *4 Co. 1. b.*

3. So if a man in consideration of marriage after to be had with *A.* made an estate of certain lands to her for life, in full satisfaction of all dower, which after marriage might accrew to her in any of his lands, and after they intermarried, yet this was no bar at law to dower, for two reasons. 1. Because she had no title at the time, but it accrewed afterwards. 2. Because no collateral satisfaction might bar a right or title to an inheritance or freehold, but now the law is altered by the *Stat. 27 H. 8.* to which the clause concerning jointures was added. *4 Co. 1. b. 2. a.*

4. Covenant for not repairing from such a time to such a time. The defendant pleaded an agreement, that the plaintiff should retain 5*l.* he owed the defendant for satisfaction of the said want of repairs. The plaintiff demurred. Objection, A parol agreement or accord is pleaded in discharge of a matter by deed. *Cur.* good; because only for a matter executory, and it is but a temporary bar, and not a perpetual bar of the covenant. *Noy 110. 6 Co. 43.*

5. References, *3 Co. 64. b. Perk. 407. 13 H. 7. 13, 20. Stat. 27 H. 8. 6 Co. 43. 9 Co. 79. 47. Cro. Ja. 99.*

442. Right where double, it shall be presumed he took in that right which was most favourable, or beneficial to him.

1. **I**F land, and rent out of the same land, come to the same person of like estate, and like surety of title, the rent is extinct. *Dr. & Stud. Lib. 1. c. 9.*
2. Also if lands descend to him who hath right to the same lands before, he shall be remitted to his better right. *Dr. & Stud. Lib. 1. c. 9.*
3. Also if two titles be concurrent together, the eldest shall be preferred. *Dr. & Stud. Lib. 1. c. 9.*
4. Disseisor leaseth the lands to the disseisee for years, or at will, who enters; the law saith, he is in of his antient and better estate. *Lit.*
5. References, *Co. Lit. 278. b. 279. a. 283. Bac. Use of the law 71.*

443. *Rogationes, quaestiones, et positiones debent esse simplices.*

Multiplex indistinctum parit confusionem, et rogationes, quaestiones, et positiones debent esse simplices. *Hob. 143.*

444. Sale of lands directed, and none ordered to sell, he must do it who had the estate.

1. **I**F one will that his lands shall be sold, and shew not by whom, his executors shall sell; for they have the greatest confidence put in them; having the disposition of the money for which it is sold. *Elf. Obs. 93.*
2. One having feoffees upon trust, wills that his executors should sell his lands, and dies, if that executor makes an executor, the executor of the executor cannot sell; because the first executor had that power, as an authority several from his executorship; and though the first had refused to act, yet he might have sold the land. And if he had willed that the chief justice should sell his land, though he resigned his office, and another chief justice was placed therein, yet the first should sell the land; and if the will were that *J. S.* should sell the land, if he die his heir cannot sell it, because the trust is determined. *Elf. Obs. 95.*
3. References, *5 H. 7. 12. b. per Hyde, Fenwick and Finneux. 1 Lev. 304. Nelf. 416. Prec. Chan. 185. 1 Chan. Ca. 177, 178, 179, 180, 211, 262. Nelf. 167, 170, 262. Prec. Chan. 123. Dy. 371. Co. Lit. 112. b. &c. Dy. 271. Hard. 204.*
4. Rule, Intention being clear, all means, without which that cannot be attained, must be supplied by a court of justice.

445. *Salus*

445. *Salus populi est suprema lex.*

General.

1. **A** Custom may be prejudicial to a particular interest, and yet be reasonable, where it is for the good of the commonwealth in general. *Da. 32, 33. Dy. 36, 60. 8 E. 4. 18. 21 E. 4. 28.*

Particular cases.

2. As a custom to make bulwarks upon another's land, for the defence of the realm. *Dy. 60.*
3. And to raise houses *in publico incendio.* *Dy. 36.*
4. So of turning the plough upon the head-land of another, in favour of husbandry, or to dry nets upon the lands of another, in favour of fishing, and maintenance of navigation. *8 E. 4. 18. 21 E. 4. 28.*
5. But a custom which is contrary to the public good, *which is the scope and general end of all laws, (Salus populi suprema lex,)* or injurious and prejudicial to the multitude, and advantageous only to a particular person, is contrary to the *law of reason, which is the most positive of all laws*; and therefore could not have a reasonable or lawful beginning, but was void *ab initio*, and no prescription of time could make it good; and therefore many customs, which have been adjudged void in our books, as being unreasonable, against common right, or meerly against law, if their nature and quality are considered, will be found injurious to the multitude, and prejudicial to the commonwealth, and to have their beginning, for the most part, by oppression and extortion. *des seigniors et grand homes.* All customs ought to be certain; for *incerta pro nullis habentur*; and *consuetudo ex certa causa rationabili usitata privat communem legem.* The three essential qualities of a good custom are, 1. Certainty: 2. Reasonableness, and 3. Usage or Continuance. *Da. 32. b. 33. a.*
6. Reference, *Jenk. 166.*
7. Rule, *Law will rather suffer a mischief than an inconvenience.*

446. *Semper praesumitur pro legitimatione puerorum.*

A Man leaveth his wife *ensient* with child; issue shall not be taken that she was not *ensient* by her husband on the day of his death; for *filiation non potest probari*, but the issue must be, whether she was *ensient* the day of his death. *Co. Lit. 126. a.*

447. *Sensus verborum ex causa dicendi accipiendus est.*

Rules.

1. **S**ensus verborum est duplex, scil. mitis et asper, et verba semper accipienda sunt in mitiori sensu. *4 Co. 13. a. 17. b.*
2. Sermo relatus ad personam intelligi debet de conditione personae. *4 Co. 16. a.*
3. Actions for words not to be countenanced. *4 Co. 18. a.*
4. In case of slander for words, the sense of the words is to be taken; and that appears from the cause and occasion of speaking of them; for

sensus verborum ex causa dicendi accipiendus est; et sermones semper accipiendi sunt secundum subjectam materiam. 4 Co. 13. b. 14. a.

5. When the words cannot possibly be true, they cannot be actionable. 4 Co. 16. a.

6. Words tending to a man's disinherison are actionable, unless he claims himself as heir, &c. 4 Co. 17. a.

7. So of slandering one's title.

8. References, 1 Ro. Ab. 37. (45.) 38. (5. 10.) Hut. 104. 4 Co. 105. Cro. Ca. 192, 436, 437, 480, 469. Cro. Jac. 240, 241, 473, 514, 642, 674. Jo. 395.

9. Rules, *Verba semper accipienda sunt in mitiori sensu. Sermones semper accipiendi sunt secundum subjectam materiam, et conditionem personarum of whom they are spoken.*

448. *Sermones semper accipiendi sunt secundum subjectam materiam, et conditionem personarum of whom they are spoken.*

RULES, *Sensus verborum ex causa dicendi accipiendus est. Verba semper accipienda sunt in mitiori sensu.*

449. *Sicut ad quaestionem facti non respondent iudices, ita ad quaestionem juris non respondent juratores.*

General.

1. **M**atter in law shall not be put in issue to be tried *per pais*; for the rule is, *quod quisquis norit, in hoc se exerceat*, and therefore *sicut ad quaestionem facti non respondent iudices*, &c. and if the jurors take upon them the knowledge of the law, and will find the special matter, and mistake the law, the judges of the law shall give judgment upon the special matter, according to the law, without any regard to the conclusion of the jurors, who ought not to take upon them the judgment of law. 11 Co. 10. b.

Particular.

To the judges.

2. The judges and sages of the law, for their authority, wisdom, learning, experience, &c. are to be honoured, revered and believed. Lord Coke's Epistle to the Reader, 4th Report.

3. Judges in England are expositors of the Irish law. 1 Vern. 405, 406.

Of what bound to take notice.

4. As they are to observe the rules above, under rule *sensus verborum*, &c. so they are also to pay a regard to, and take notice of the sense of the words in the places, where, &c. Pal. 102. And also they are to take notice of the king's title; for the court and judges are of the king's council, but then his title must be incontestably clear against both plaintiff and defendant. Hob. 163, 164.

To the jury.

Who exempted from.

5. References, 28 E. 1. 9. 13 E. 1. 38. Co. Lit. 156, 157, 158, 172. Hard. 389.
6. Rules, *Clerici non ponantur in officio*.

What crimes disable one to be a juror.

7. References, Stat. W. 2. cap. 38. Art. super Chart. 9. Co. Lit. 6. a. b. 158. a. b. Tri. per Pais.

Who may be jurors, and who not, and their properties.

8. Reference, Co. Lit. 155, 156, 157, 172.

Of what they are to determine.

The fact.

9. See before General.
10. General References, Co. Lit. 125. 9 Co. 13. a. 12 Co. 67. Plow, Com. 230. Tri. per Pais.
11. Rule, *Quod quisquis norit, in hoc se exerceat*.

450. *Simplicitas est legibus amica, et nimia subtilitas in jure reprobatur.*

General.

1. **E**VERY estoppel ought to be reciprocal, certain, and a precise affirmation of that which maketh the estoppel, and not to be spoken impersonally. Co. Lit. 352. b.

Rules.

2. As if it be said, *ut dicitur; quia impersonalitas non concludit, nec ligat; impersonalis dicitur, quia sine persona*; neither doth a recital conclude, because it is no direct affirmation. Co. Lit. 352. Vide 103.

3. Rules, *Equity will not aid new inventions, &c. Law favours justice, &c. Prefers the public good, &c. Requireth order and decency, &c. Will rather endure a particular mischief, &c. Will rather suffer things against the principles of law, &c. Will not suffer wrong. Will admit no proof against what the law presumeth. Hath always suppressed new and subtle inventions in derogation of the common law.*

451. *Si mulier nobilis nupserit ignobili, desinit esse nobilis.*

1. **T**HERE is a difference between a woman who is noble by descent, and one only noble by marriage; for if a woman, who is noble by descent, marry one under the degree of nobility, yet she remaineth noble still; but if she only gained it by marriage, she loseth it if she marry under the degree of nobility, and so is the rule, *si mulier nobilis, &c.*

to be understood. But if a duchess by marriage, marrieth a baron of the realm, she remaineth a duchess, and loseth not her name, because her husband is noble; *et sic de caeteris.* Co. Lit.

2. References, 2 H. 6. 11. 14 H. 6. 18. 22 H. 6. 52. Bro. Abr. 6 Co. 53. 4 Co. 118.

452. *Solum rex hoc non potest facere, quod non potest injuste agere.*

1. **R**efences, Co. Lit. 19. b. 1 Co. 44. 6 Co. 55.

2. Rule, *The king can do no wrong.*

453. *Solus deus haeredem facere potest, non homo.*

1. **H**aeres, in the legal understanding of the common law, implieth that he is *ex justis nuptiis*; for *haeres legitimus est, quem nuptiae demonstrant*, and is he to whom lands, tenements or hereditaments, by the act of God, and right of blood do descend, of some estate of inheritance; for *solus deus haeredem facere potest, non homo. Dicuntur autem haereditas et haeres ab haerendo, quod est arte insidendo; nam qui haeres est, haeret, vel dicitur ab haerendo quia haereditas sibi haeret; licet nonnulli haeredem dictum velint quod haeres fuit, hoc est dominus terrarum, &c. quae ad eum perveniunt. A monster, &c. may not be an heir.* Co. Lit. 7. b. 8. a.

2. References, Co. Lit. 22. b. 237. Prec. Chan. 3. Gilb. 129.

454. *Spiritual office draws with it a right to have the possessions belonging to the office.*

SEE rule, *Qui sentit onus sentire debet et commodum.*

455. *Stabit praesumptio donec probetur in contrarium.*

Presumptions of law favoured.

General.

1. **P**rescription and antiquity of time fortifieth all estates, and supposeth the best beginning the law can give them. Hob. 297.

2. There are presumptions of law so violent, as though they are false, a man shall not be received to aver against them. Hob. 297.

3. A law grounded on presumption, if the presumption be untrue, it is not to be holden in conscience; for *stabitur praesumptio donec probetur in contrarium.* 1 Chan. Ca. 201.

The sorts.

4. There are three sorts of presumptions. 1. Violent. 2. Probable, and 3. Light, &c. Co. Lit. 6. b.

Parti-

Particular cases.

5. A deed is inrolled in such a term; it shall be intended in law, that the deed was inrolled the first day of the term; for the term, as to many purposes, is but one day in law. Yet as the plaintiff had, in the particular case, by his demurrer confessed the inrolment to be after; the presumption is vanished and became of no force; for *stabit praesumptio donec probetur in contrarium*. 4 Co. 71.

6. True it is, that records import in themselves verity, and conclude all people to deny any thing apparent in the record, &c. Vide 37 H. 6. fo. 21. b. Plow. Com. 7. Dy. 242. But an averment which stands with the record, and which does not impeach any thing within the record, the law allows, as against a fine upon a release, to say that the cognizee had nothing at the time of the fine levied. So against letters patent of the king under the great seal shewed in court, regularly none may deny them, but *non concessit per praedictas literas patentes* is a good plea; and so in the case next foregoing, though the inrolment, or other matter of record, shall not be tried *per pais*; for that the inrolment might not be brought in question, yet the time of it may, &c. 4 Co. 71. b.

7. So if profession be denied, it shall be tried by the court christian, but if the time of the profession be in issue it shall be tried *per pais*, as is held 9 H. 7. 2. 4 Co. 71.

8. In a *praecipe* the tenant pleaded himself villain to T. S. and that he hath nothing but his villainage; the demandant had no reply, though it were false, but his writ must needs abate, till Stat. 37 E. 3. admitted the counter-plea. Mansel's case. See Hob. 297.

9. So in replevin, if upon an avowry the tenant disclaims, he shall have judgment, though it be false; for the law believes the parties will not do themselves wrong in so high a degree. Hob. 297.

10. So the law presumeth violently, that a layman cannot be absolutely discharged of tithes; and therefore it will not allow a prescription of such discharge; (*but this in favorem ecclesiae, lest laymen should spoil the church*) holding it more reasonable, that some one man should suffer a mischief to lose such a privilege, being so improbable, and of so dangerous consequence, than, for his particular, to admit a spoil of the church and a decay of religion, according to the rule, *Omne magnum exemplum aliquid habet ex iniquo, quod publica utilitate compensatur*. So though you shall be allowed your discharge, when it appeareth; yet when it appeareth not, *stabitur praesumptioni, donec probetur in contrarium*. Hob. 297.

11. References, Co. Lit. 74. 2 Co. 48. a. Hob. 44. Palm. 118, 119. Cro. Jac. 57, 58. Cro. Eliz. 578, 579.

12. Rules, *All the term in law but one day*. Law will admit no proof against that which the law presumeth. *Nullum iniquum est in jure praesumendum. Omnia praesumuntur solemniter esse acta*.

456. Statutes made against fraud, are to be construed liberally, and expounded beneficially to suppress fraud, &c.

RULES, *Dona clandestina sunt semper suspiciosa. Rex est mixta persona cum sacerdote.*

457. Statutes penal to be construed strictly.

RULES, *Ad ea quae frequentius accidunt jura adaptantur. Rex est mixta persona cum sacerdote.*

458. Statutes, the preamble of is to be taken for truth; and it cannot be supposed that statutes made by authority of the whole realm will recite a thing against truth.

1. **I**T cannot be thought that statutes made by authority of the whole realm, king, lords and commons, will recite a thing against the truth. *Doct. & Stud. lib. 2. cap. 55. fo. 165. b.*

2. The rehearsal or preamble of a statute is to be taken for truth; for it cannot be thought, that a statute made by the authority of the whole realm, as well of the king, as of the lords spiritual and temporal, and of all the commons, will recite a thing against the truth. *Co. Lit. 19. b.*

459. Statutes to be construed according to natural equity.

RULES, *Aequum et bonum est lex legum. Dona clandestina sunt semper suspiciosa. Ca. 1.*

460. Statutes to be construed in equity.

1. **A**ffirmatives in statutes that introduce new laws do imply a negative of all that is not in the purview. *Hob. 298.*

2. A court of equity is not to alter the law. Statutes are binding in equity as well as at law, and if a judgment be good at law by a statute it cannot be set aside in equity. *2 Vern. 697.*

3. References, 1 Chan. Ca. 71, 72. *Fi. Ley 6. b. 15. a. Co. Lit. 382. 4 Co. 22.*

4. Rules, Equity proper interpreter of statutes. *Constructions to be secundum aequalitatem rationis.*

461. Statutes are to be construed that the innocent may not be damnified.

1. **R**Eference, Co. Lit. 11. b. 381, 24, 79, 290, 365, 280, 336, 42, 183.
2. Rule, *Constructions to be according to equity.*

462. *Summa charitas est facere justitiam singulis, et omni tempore quando necesse fuerit.*

General.

1. **T**HE law will never presume that any one will do a thing either against religion or any religious duty. 11 Co. 70. b.

Particular.

2. So a parson shall be intended by the law resident upon his benefice for the cure of the souls he hath there; for a parson with cure of souls, who is non-resident, *non est dispensator sed dissipator, non speculator, sed spiculator.* 11 Co. 70. b.

3. So in the case at bar, the law will never make constructions against the support of religion, advancement of learning, and maintenance of the poor, &c. 11 Co. 70. b. *Vue tout le cas.*

4. Rules, *Rex est mixta persona cum sacerdote.* It is the office of temporal judges to advance laws made for religion according to their end, though the words be short and imperfect.

463. *Summa ratio est quae pro religione facit.*

1. **T**HE statute 1 Eliz. proves that acts, which restrain ecclesiastical persons from wasting their possessions, which were given to maintain the service of God, bind the king, unless special provision be made to the contrary by the same act. *Et summa ratio est quae pro religione facit.* 5 Co. 14 b.

2. References, 11 Co. 70. Hob. 295. Jenk. 162, 166, 233. 2 Ch. Ca. 18. Salk. 294. *The Bishop of St. David's case.*

3. Rules, *Favendum est ecclesiae, quam personae.* *Rex est mixta persona cum sacerdote.* It is the office of the judges to advance laws, &c.

464. *Summum jus summa est injuria.*

1. **L**AWS are compared to grapes, which being too much pressed yield an hard and unwholesome wine. *Ira viri non operatur justitiam dei.*

2. According to Aristotle, strict or precise law, or *summum jus*, is so called, because that if it have no allay in it to qualify the harshness and severity of it, it is unpleasant and sower in taste, and repugnant in equity. And *Budaens* saith, that amongst the civilians it is the same as a very hard law, exact and full of rigour, and almost unjust; and this strict or precise law

law is set by those who write of law opposite to equity; and this law, by some lawyers, is termed also *subtile jus*, a subtil law, by others *summum jus*, or law in the highest degree, or most exact; and it is so to be taken when men regard more the letter than the law itself. *Oldendorpius* divideth this *summum jus* into proper and improper. 1. Proper is an undoubted and infallible rule of honesty, which may generally, without exception, be put in execution in any commonwealth, whether originally grounded upon the law of nature or upon the law of nations: but here is no respect had to any circumstances, but that belongeth to equity, or the court of conscience. Now because precise law, as it is a fixt rule, and cannot consider circumstances, is, though very wrongfully, called wrong in the highest degree, *summum jus summa est injuria*; yet it is the justest reason that may be, nay it is the perfection of reason, and hath no fault in itself, but the error is in the minds of men prone to evil, and not judging aright of the circumstances of the fact, wherein law and right standeth. 2. Improper, when by an over rigorous and hard interpretation it is drawn to inconvenient kind of facts, or by colour is forced to frustrate the good meaning of the law. 2 *West's Prec.* 173. b. 174. a. b.

3. *Summum jus* often regardeth the very words and letter of the common law, for remedy whereof the parties grieved pray aid of chancery to bridle the extremity, and reduce such rigour to equity and conscience. 2 *West's Prec.* 173. b. *Hob.* 145.

465. *Simony odious in law.*

1. **T**HE law abhors simony, so that before the statute *W. 2. cap. 5.* the plaintiff in a *quare impedit* recovered no damages for the loss of his presentation; and this is the reason that guardian in socage shall not present; because he can take nothing for it, and so cannot account for it; and by the law he can meddle with nothing he cannot account for. *Co. Lit.* 18. a. 344. b. 6 *Co.* 51. a. b. 52. b.

2. If an incumbent were guilty of simony in obtaining a benefice, he was made incapable of that benefice for ever, by the words of the statute 31 *Eliz.* which are largely to be expounded. *Hob.* 75.

3. And such incumbent as cometh in by reason of any corrupt agreement, is so absolutely disabled for ever to be presented to that church, that the king cannot by lapse present him thereunto. *Co. Lit.* 20. a. *Plow. Com.* 502.

4. If parishioners pay tithes to him who came in by simony, it is at their peril. *Hob.* 168.

5. Statutes of simony extend not only to benefices with cure, but also to dignities, prebends and all other ecclesiastical livings. *Co. Lit.* 120.

6. References, 4 *Co.* 49. 3 *Inst.* 204. *Salk.* 294. *Watson, Bishop of St. David's case.* See *Can.* 40. *Salk.* 322. 5 *Co.* *De Ju. Regis Eccl.* 9. a. *Co. Lit.* 344. b. *Hob.* 75. *Co. Lit.* 120. *Plow. Com.* 502. *Hob.* 165, &c. 6 *Co.* 51, 52. 2 *Vent.* 39, 213.

466. *Talis*

466. *Talis interpretatio semper fienda est, ut evitetur absurdum et inconueniens, et ne iudicium sit illusorium.*

1. **R**Eferences, 1 Co. 14. *Sir William Pelham's case.* Mo. 423. 2 Leon. 60. Co. Lit. 362. a. 18 E. 3. 4. 16. 4 Co. 48. *Andrew Ognel's case.*

2. Rules, *Constructio legis non facit injuriam.* Law favours justice, &c. *Is the perfection of reason.* Requireth order and decency, &c. *Will not suffer wrong.*

467. *Talis non est eadem; for nullum simile est idem.*

TALIS indentura, qualis as in the count is alledged, is no direct answer to the indenture mentioned in the declaration; for *talis indentura non est eadem indentura*; for *nullum simile est idem.* 4 Co. 18. b.

468. *Tempus est edax rerum.*

1. **I**N the case of a charter of feoffment, if all the witnesses to the deed be dead, as no man can keep his witnesses alive, and time weareth out all men, then violent presumption, which stands for a proof, is continual and quiet possession; for *ex diuturnitate temporis omnia praesumuntur solemniter esse acta.* Co. Lit. 6. b.

2. References, 12 Co. 4, 5. *Palm.* 426, 427. *Hard.* 382. 1 *Mod.* 117.

3. Rule, *Omnia praesumuntur solemniter esse acta.* Ca. 8.

469. *Term for years regularly cannot be intailed, though it may be made to wait upon an inheritance that is intailed.*

General to, and rules.

1. **T**HOU' a term cannot be intailed, yet it may wait on an inheritance which is intailed, and when it is thus limited, it is not properly an intail within the statute *de donis*, but governable partly by equity, and partly by law. 3 *Chan. Ca.* 3, 4, 5, 7, &c. 23.

2. And the trust of a term to attend the inheritance must be to the same uses with the inheritance. 3 *Chan. Ca.* 4, 10, 11, 23, 24.

3. And such a trust is but a creature of equity, and may be barred *sans fine* or recovery. 3 *Chan. Ca.* 3. 6.

4. Yet where a term attends on the inheritance, it may be barred by recovery. 3 *Chan. Ca.* 16.

5. Rule, *Perpetuities odious in law and equity.*

470. *Terminus et feodum non possunt constare simul in unâ eademque personâ.*

What merger is.

1. **E**STATES in lands are properly merged when the lesser estate meets with the greater in the same person, and right; as *terminus et feodum non possunt constare simul*, &c. for a term is finite, and a fee-simple infinite; and the finite, of necessity, must be swallowed and lost in the infinite; but this is confounding and not extinguishing. *Da. 4. b.*

Particular cases.

2. For if the particular tenant grant or surrender his estate to him in reversion, the particular estate is not extinct, though it be merged; for if the particular tenant had charged the land with a rent, or other incumbrance, the estate remains in *esse* as to that. *Dav. 4. b.*

3. And true it is, that estates in land, and right to lands, are things of the substance, that they cannot be extinct, or *interire penitus*, and so it is that *Littleton* saith, that if the Disseissee, when his entry is tolled, release to the tertenant, all his right, that it shall enure by way of extinguishment, for the right which he had passed to the tenant by his release: and it should be inconvenient that such antient right should be utterly extinct; for *rights never die*. *Da. 4. b. 5. a.*

4. Yet things that are issuing out of lands, as a seignior, rent-charge, &c. are liable to extinguishment to all intents. *Plow. Com. 419 a. Lit. 112. b.* So real actions also and conditions, are subject to extinguishment. And this is *quasi* by unity of possession, as in all cases of remitter, he who hath right of action for the lands, having the possession of the lands, there is none against whom he may bring his action; and therefore the action is extinct for ever. And, on the same reason, a condition which gives title of re-entry into land is extinct by purchase of all or part of the land, *8 H. 7. 8. b. 33 H. 8. Bro. Extinguishment 49.* So a warranty is extinguished by re-feoffment, or descent of the lands to the same person who hath the warranty. So of unity of possession in some, though not in other cases, &c. *Da. 4. b. 5. a. b.*

5. Rule, *Lesser estate mergeth in the greater.*

471. *Testamenta cum duo inter se pugnancia reperiuntur, ultimum ratum est.*

SEE rule, *Ultima voluntas testatoris perimplenda est secundum veram intentionem suam.*

472. *That shall have the benefit, which hath or would have sustained the loss.*

1. **A** Mortgage in fee is forfeited, the mortgagee dies, and the mortgagor comes to redeem; equity will decree the money to be paid to the executor or administrator of the mortgagee, the mortgagee being dead. *1 Ch. Ca. 283.* So the mortgage land shall be decreed to the executor or administrator, and not to the heir. *1 Vern. 412.* And the heir of the mortgagee shall be compelled to convey to the executor or administrator. *2 Ch. Ca. 50, 51.*

2. But where one purchased of a mortgagee under an apprehension that he had an absolute estate, the mortgagor coming to redeem, the money was decreed to the heir; and not to the executor. *1 Vern. 271.* For as in the first case the personal estate bore the loss; it being intended only a security for money: so in the latter case, the real estate bore the loss; it being an absolute purchase. *Francis's Max. Eq. 21. 3 Rep. Ch. 222.*

3. That in the case of a mortgage in fee, and the mortgagee dying before payment, the money should be paid to the executor or administrator, and not to the heir, was an unsettled point; for where there was neither bond nor covenant for payment, nor any defect of assets to pay debts, and the condition was to pay the heirs of the mortgagee, or to the heirs or executors, &c. the court many times doubted, and sometimes decreed the mortgage money to the heir. *Vide 1 Rep. Ch. 183. 2 Rep. Ch. 155, 242. 1 Ch. Ca. 88. 1 Vern. 170.* But all these doubts are now ousted, and the money, in all cases, is to be paid to the executor or administrator. *Vide 1 Ch. Ca. 283. 2 Ch. Ca. 50, 51, 220. 2 Vern. 348, 351. Vide etiam 1 Vernon 412. Max. Eq. 21.*

4. The *East India* company sued their factor for an account of 12000 *l.* in gold, which he carried thither from hence. He, on his account, demanded (according to the usual custom) allowance for so much paid for customs to the king of *India*. It was insisted, that he never paid the custom there, for the gold; so whether he, or the principal merchant should have the custom, was the question? On reference, two merchants certified, That, by the course of merchants, the factor should retain the benefit of the non-payment of the customs; for that if the principal freight, by his non-payment of the customs, had been lost, he must have answered for it to the employer, and so run the hazard of it wholly. And in this case, the factor, by the law of *India*, had it been discovered, that he had made such concealment, and not entered into the custom-books, would have lost his life as a felon. Two other merchants certified, That the employer was to have the benefit of the non-payment of the customs. And, upon these certificates, it was decreed, That the factor should have the benefit of these customs; for it was a duty to be paid, and the employer could make no title to it, against him who was in possession; and *he who hath possession hath right against all but him that hath the very right.* *1 Ch. Ca. 25.* And yet as the margin observes, *a factor is only in nature of a trustee for his principal.* See *2 Vern. 638.*

5. The factor hath stolen the custom of divers goods, whereof the bill sought an account and discovery, whether he paid the said customs or not? The defendant in his answer insisted, he was not bound to answer that part of the bill; for that the plaintiff, who was the employer, was not intitled to those customs, nor any advantage, whether they were paid or not. Exceptions being taken to this answer, the master certified it sufficient. And, on exceptions to the report, it came now before the court, and the case *Smith and Oxenden* fo. 25. was cited: but on the plaintiff's side it was insisted, that this case was not like that; for that was of custom stolen from a foreign king, and this was of custom stolen from our own king, and that it would be of evil consequence, and an encouragement to evil factors, if the court should give an opinion for them in a matter of fraud, as this was. And whereas it was insisted by the defendant's counsel, that it was the course of merchants, that factors should have the benefit of customs themselves, and not the principals, because the penalty would fall on the factor if discovered, it was declared that could not be called a custom, being grounded upon fraud; and therefore the court ordered, that the defendant should answer whether he paid the custom or not. 1 Ch. Ca. 30. *Quære, Whether this case doth not bear hard upon the rule, Nemo tenetur seipsum prodere; as well as for that the wrong done is, in truth, to the revenue of the crown, and not to the plaintiff; who, by this bill is seeking advantage of another's wrong, and that of a fraud too committed against the crown.*

6. The defendant had employed the plaintiff as his factor beyond sea, and brought an action at law against the plaintiff, and had judgment, *quod computet*. The plaintiff brought his bill here for an allowance, upon account of what he had saved in not paying the customs of the goods (which could not be allowed before the auditor, as was said) and an allowance was accordingly decreed him against the defendant, the employer. 1 Ch. Ca. 76. *It is observed in the margin, That this case is founded upon the general rule above, where he is not particeps criminis; for then it is otherwise; for no man shall take benefit of his own wrong.*

7. References. 1 Ch. Ca. 98. 2 Ch. Ca. 49, 152, 156, 187. 1 Vern. 1, 188, 341, 436, 415. 2 Ch. Ca. 115. 2 Ventr. 359. Salk. 154. 1 Vern. 403, 435. S. C. 2 Rep. Ch. 377. 1 Vern. 133. 2 Ch. Ca. 36. S. C. 1 Vern. 297. 6 Mod. 162. 2 Vern. 638.

473. That shall make satisfaction which received the benefit.

1. [F it be a duty or charge in equity, the personal estate shall be first applied. 2 Ch. Ca. 84.
2. If the real estate be charged with the legacies, yet the personal estate shall be first applied. 1 Ch. Ca. 297.
3. But where the ancestor purchased the equity of redemption which descended to his heir, the mortgage was not satisfied out of the personal estate. 1 Vern. 37. Salk. 449. For by the purchase of the equity of redemption, the personal estate was not increased but diminished; and this was formerly decreed otherwise; that in case there was no covenant in the mort-

mortgage deed for payment of the mortgage money and interest, the administrator was not obliged to discharge the same. *1 Rep. Ch. 275.* Here the money came out of the personal estate, and it cannot be equity, that the personal estate should be further charged with the redemption; as that would be to convert the personal estate, to the manifest hurt of those intitled thereunto, into a real estate, for the benefit of the heir. Debts shall (but legacies shall not) be paid out of the personal estate, though it be thereby diminished to the prejudice of a widow, who claims her thirds by custom. *2 Ch. Ca. 84, 85. 1 Vern. 36. S. C.*

4. If the personal estate be not expressly devised to the executor, it then remains in his hands as executor; and consequently to go in ease of the real estate. As where a man conveys his lands to trustees to pay his debts, and made his wife his executrix, but did not expressly give her the personal estate, it was decreed to be applied in ease of the real. *1 Ch. Ca. 297.* *And yet this was in case of a wife, who is intitled to more favour than other executors commonly are, as I conceive appears from the case, where a husband devised all his books to another, except ten books, such as his wife should chuse, as plays, romances, sermons, but not law books, where it was agreed this was not a devise of the books to her, but an exception out of the devise of his library or study, and that it was not to be thought the testator intended to bar his wife of the benefit of the executorship, by so inconsiderable a devise.* *Pre. Ch. 231. See also 263, 264.*

5. The heir being sued, and having paid a debt of his ancestor by bond, the executor was decreed to reimburse him. *1 Ch. Ca. 74.* Lord chancellor declared the personal estate in the hands of the executor shall be employed in ease of the heir, by what ever means, he became indebted as heir. *2 Ch. Ca. 5. 1 Ch. Ca. 271.* Though there be no covenant in the deed for payment. *1 Vern. 436. Salk. 449.* for the personal estate received the benefit by the contract; and therefore shall make satisfaction. *Max. Eq. 19.*

6. But though in the case of an heir, debts affecting the real estate shall be paid out of the personal assets, yet not so in the case of a devisee, *1 Ch. Ca. 271.* but after, that difference was disallowed in the case *Pockley and Pockley*, where lord chancellor declared, that not only the heir, in case he be charged with the debts of his ancestor, but also the devisee of the land shall be disburthened of the debts lying upon the lands, by the personal estate in the hands of either executor, or administrator *2 Ch. Ca. 84. 1 Vern. 36. S. C.* where it is reported to be said by lord chancellor, That not only he, who is *haeres factus*, should pray in aid of the personal estate in ease of the real, but even an ordinary devisee should have the like benefit: for the rule is, **That shall make satisfaction which received the benefit, and that was the personal estate which was increased by the money borrowed on the mortgage; therefore, according to this rule, and good equity, the personal estate ought to make satisfaction.**

7. The heir of the mortgagor shall have the personal estate first applied to pay off the mortgage; and that though there were no covenant for payment in the mortgage deed; and that though the personal estate was devised away; because it is a debt. *Pre. Ch. 61.*

8. And so it was that the heir being sued, and having paid a debt due from his ancestor on bond, the executor was decreed to reimburse him, as far as personal assets come to his hands would extend. 1 Ch. Ca. 74.

9. And therefore the heir, though liable to pay his ancestor's debts, and cannot otherwise be discharged therefrom, is to have aid over, and to be reimbursed out of the personal estate, and out of the land directed by the ancestor to be sold to pay debts, so far as both will extend. 1 Rep. Ch. 155, 156, 157.

10. The testator held the lands subject to a rent, which he let run; though his person was not liable at law, to payment, yet decreed the executor, and not the present tenant should pay the arrears, as far as assets, &c. because by non-payment the personal estate was increased. 1 Ch. Ca. 121.

* 11. Although a real estate be made liable to debts, yet it shall only come in aid of the personal estate, and the personal estate shall be first applied. See case before the house of lords, *Nokes and Derby*, 12 April 1727.

* 12. So also the personal estate was decreed to be first applied to discharge the mortgage (after debts, legacies and funerals discharged) in case of the real estate. See case *Braine et ux' versus Woolaston et al.* before the house of lords, 24 Feb. 1728.

* 13. So where one conveyed all his lands *in trust* for the payment of debts and legacies, and then by his will devised all his personal estate to his wife; yet the personal estate was directed to come in aid of the real estate. See the case *French and Christopher*, before the house of lords, Feb. 1707.

* 14. Yet, in this case, the personal estate was not allowed, to be applied to discharge a real lien on the real estate, laid by the ancestor. See case *Evelyn and Evelyn*, before the house of lords, 8 May 1733. Note, as I presume, this case was circumstanced with honest creditors, whose demands only affected the personalty; therefore their lordships most equitably denied the heir this benefit, in favour of such creditors, where, should their fund be exhausted in satisfying such superior debts, they must, in equity, stand in the place of such superior creditors, for so much as their own fund has been diminished by such improper application; and therefore, to prevent circuitry of actions or multiplicity of suits, their lordships denied the benefit to the heir in the first instance. Tamen quaere.

15. References, Max. Eq. 19, &c. 1 Ch. Ca. 80, 81, 98. Pre. Ch. 423, 477. Gilb. 106, 107. 1 Ch. Ca. 223. Nels. 220, 230, 476. Gilb. 57, 69. Pre. Ch. 494, 511. Gilb. 151. 2 Vent. 349, 366, 367. 1 Vern. 204, 324. 2 Vern. 416, 439, 424, 508. Eq. Abr. 268, 269. Gilb. 72, 73, 74.

16. Rule. See last rule. Personal estate to go in aid of the real.

474. That which is the open and publick treaty and agreement on marriage, shall not be lessened or infringed by any private agreement.

1. **O**N a treaty of marriage between the plaintiff and her husband, her father would not consent, because the intended husband was indebted 200 l. to B. on bond, wherein he and his mother were bound. To

remove this difficulty, the mother and her younger son gave a new bond to *B.* and the former bond was cancelled: but the husband after gave the brother a counter-bond, and actually paid the interest during his life; and it was in proof, that the widow the plaintiff, being in love, contrived this way to satisfy her father, that the marriage might take place; but now being sued by the brother on the counter-bond, as administrator to her husband, she brought the present bill to be relieved. Lord chancellor: This is a plain fraud and contrivance by which the father was drawn in; and declared if the husband had been plaintiff, he should have been relieved; and therefore decreed the bond to be delivered up. 1 *Vern.* 348.

2. A marriage was in treaty between *Gale* and the sister of *Edward Pitman*; the woman not having as great a portion as *Gale* insisted on, prevailed with her brother to let her have 160*l.* to make up her portion, and gave her brother a bond for it, and thereupon the marriage was had; and the husband, who knew nothing of this bond, died *sans* issue, and then the wife died, and made the plaintiff her executor; and *Pitman* the brother dies also, and makes the defendant his executor, who put the bond in suit against the plaintiff to recover back the 160*l.* and thereupon the plaintiff brings his bill for relief. For the defendant it was insisted, that though it might be a fraud as to the husband, or any issue of his, who were to have the benefit of the marriage agreement; yet the husband being dead, and there being no issue, the bond should be good against the wife herself, and by consequence against the executor, there being no creditors in the case, nor deficiency of assets. Lord chancellor: You admit the husband might have been relieved; *that which was once a fraud will be always so*; and the accident of the wife's surviving the husband will not better the case. Decreed the bond to be delivered up. 1 *Vern.* 475. *Quaere*, If the condition of the bond had been, that in case the woman survived the husband, that she should pay it, whether she would have been relieved. *Note*; It was proved in the cause, that after the death of the husband the wife agreed to pay the money, and actually did pay part. *Sed non allocatur.* 1 *Vern.* 475.

3. The plaintiff on marriage with the defendant's daughter, whose portion was 1200*l.* was obliged by the father to give a bond, in order to get his consent for 200*l.* if the plaintiff's wife died *sans* issue, or the issue died before 18 or marriage; the wife died without issue; and the bill was for relief against the bond; the portion being given by the plaintiff's wife's aunt, and the father giving her nothing. *Cur.*: It is in the nature of a brokerage-bond, and to be delivered up to be cancelled, and the defendant to refund interest paid, but without costs. 2 *Vern.* 588.

4. References, 1 *Vern.* 240, &c. 2 *Vern.* 500, 527. and *Lord Mobun's* case. 2 *Mod. Ca.* 3, 4, 98. 1 *Chan. Ca.* 243. 2 *Mod. Ca.* 106, &c. 131, &c. 160, &c. 1 *Rep. Chan.* 87. 3 *Rep. Chan.* 31. *Prec. Chan.* 165, 267, 522. *Gilb.* 148. *Show. Parl. Ca.* 76. See also *Fraud*, &c.

475. *That which was once a fraud will always be so.*

RULES, *Quod ab initio non valet*, &c. Also the last rule, case 2.

476. *The next of the worthiest blood shall ever inherit.*

RULE, *Propinquior excludit propinquum, &c.*

477. *Things to be done by him who hath most skill.*

Obligation *sur* condition that the obligee shall bring to the obligor's shop (being a taylor) so much cloth, which is to be cut out, and the obligor is to make the obligee a gown of it; here the obligor must cut the same out, as well as make it. So if a merchant agree with the king's collectors that his merchandize shall be weighed at the king's beam, and the king to have his duty as it riseth, the collectors must weigh it. 9 E. 4. 4. 4 E. 6. 15. 4 Eliz. 230. Lit. 22. 11 E. 4. 36.

478. *Things shall not be void which possibly may be good.*

1. LANDS given to a man and the wife of another, and the heirs of their two bodies, is a present tail executed; for the possibility that they may marry. 15 H. 7. 10. 1 Co. 113. *Chudeley's case*.

2. A mesnalty is given in tail, reserving rent, and good; for the tenancy may escheat to the donee, and then he shall distrain for all the arrearages. 1 H. 4. 1.

3. A man hath issue a daughter, and leaveth his wife *privement ensient*, the wife may detain the charters from the daughter; for the possibility that the child the wife goes with may be a son. 41 E. 3. 11.

479. *Traditio loqui facit chartam.*

IN *ejectione firmæ* between Clayton and Presenham, the case was, Indentures of demise were bearing date 16 May, anno 25 Eliz. but were delivered at four o'clock on the 20th of June, anno 25 *supradict.* and when this lease should have its commencement, whether from the day of the date or the delivery, was the question? Resolved by Wray chief justice, Sir Thomas Gaudy *et tout le court*, that *from henceforth*, should be accounted from the day of the delivery of the indentures, and not from the date; for *from henceforth*, is tantamount to say from the making, *ou del' temps del deliverie des indentures*, or a *confectione præsentium*; for the lease hath its commencement and efficacy by the delivery, and the words *from henceforth*, or any other words of the indenture, are not of force or avail till the delivery; *quia traditio loqui facit chartam.* 5 Co. 1. a.

480. *Transit terra cum onere.*

General to, and rules.

1. WHEN the covenant extends to a thing in being, parcel of the demise, the thing to be done by force of the covenant, is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and bind the assignee, though not named or bound by express

press words; but when the covenant extends to a matter not in being at the time, it cannot be appurtenant or annexed to such matter, not having essence at the time. 5 Co. 16. a. b.

2. It was resolved, in the principal case, (*being the case of Spencer et ux', which follows*) that if the lessee had covenanted for him and his assigns, that they should make a new well on any part of the demised premises; that as it was to be done upon the lands demised, that it should bind the assignee; for though the covenant goes to matter to be newly done, yet it is to be done upon the thing demised, and the assignee is to take the benefit; and therefore it shall bind the assignee by the express words; but though the covenant be for him and his assigns, yet if the thing to be done, be merely collateral to the land, and no ways concerns the thing demised the assignee shall not be charged. 5 Co. 16. b.

3. It was also resolved, that if a man demise sheep, or a stock of cattle, or any other personal goods, for a term, and the lessee covenants for him and his assigns, at the end of the time or term, to deliver other cattle or goods, as good as those demised were, or such a price for them, and the lessee assigns over, this covenant shall not bind the assignee; for it is but a personal contract, and wants such privity as is between lessor and lessee and his assigns of the land, in respect of the reversion; but in case of goods personal, there is no privity, nor any reversion, but merely a matter in action, and that only in the personalty, which can bind none but the covenantor, his executors or administrators who represent him. The law is the same if one demise an house and lands for years, with a stock or sum of money, rendering rent; and the lessee covenant for himself, his executors, administrators and assigns, to deliver the same at the end of the term, the assignee shall not be charged with this covenant, for though it be true, that the rent reserved was increased on account of the stock, or in respect of the sum of money, yet the rent did not issue out of the stock or money, but out of the lands only; and therefore as to the stock or money, the covenant is personal, and binds the covenantor, his executors and administrators, but not his assigns; for it is not certain that the stock or money came to the hands of the assignee; for it might be otherwise wasted, or made away by the lessee; and therefore the law could not determine, at the time of the lease made, such lease to bind the assignee. 5 Co. 16. b. 17. a. *Quod ab initio non valet, &c.*

4. If the lessee *pur ans* covenant to repair the houses during the term, this covenant shall bind all others, as a thing appurtenant and running with the land, into whosoever hands the term comes, as well those who come in by act of law, as by act of the party; for it is the same thing in respect to the lessor, and if the law were not so, great prejudice might ensue to him. *And reason demands, that those, who take advantage of such covenant which the lessor made with the lessee, should be bound with the covenants the lessee made with the lessor.* 5 Co. 17. b.

Particular cases.

5. *Spencer* and his wife brought covenant against *Clarke*, and the case was, *Spencer et ux'* by indenture demised an house and lands (the right of the wife) to S. for 21 years, and by this indenture S. covenanted for him, his executors and administrators with the plaintiff, that he, his

execu-

executors, administrators or assigns, should build a brick wall upon part of the lands demised, &c. S. assigned over the term to J. and J. to the defendant. For the not building the brick wall upon part of the lands demised, the plaintiffs brought their action of covenant against the defendant as assignee; and, after many arguments at the bar, the case was strongly argued and debated at the bench: and resolved, *int' al'*, by Sir Christopher Wray lord chief justice, Sir Thomas Gaudy, *et tout le court*, that when the covenant extends to a thing *in esse*, *parcel of the demise*, the thing to be done by virtue of the covenant, is *quodammodo* annexed and appurtenant to the thing demised, and shall run with the land, and bind the assignee, though he be not bound by express words; but when the covenant extends to a thing not in being, or that hath not essence at the time of the demise made, it cannot be appurtenant or annexed to such thing not *in esse*; as if a man covenants to repair the house to him demised during the term, this is part of the contract, and extends to support the thing demised; and therefore is *quodammodo* annexed and appurtenant to the house, and therefore shall bind the assignee, though he is not expressly bound by the covenant; but in the case at bar, the covenant concerned a matter not in being at the time of the demise made, but new, and to be done afterwards; and therefore, though it shall bind the covenantor, his executors or administrators, it shall not bind the assignee; for the law will not annex the covenant to a matter not in being. 5 Co. 16. a. b.

6. If the lessee covenant for him and his assigns, to build an house on the lands of the lessor, not parcel of the demise, or to pay a collateral sum to the lessor, or to a stranger, these shall not bind the assignee, because it is merely collateral, and in no sort toucheth or concerneth the thing demised, or that is assigned over; and therefore the assignee of the thing demised, cannot be charged with it, no more than any other meer stranger. 5 Co. 16. b.

7. In *B. R.* between *The Dean and Chapter of Windsor and Hide*, the case was, One leased an house by indenture for years; the lessee covenanted and granted for him and his executors with the lessor, to repair the house at all times necessary: the lessee assigns to *Hide*, who suffers the house to run out of repair, whereupon the lessor brings covenant against the assignee. And it was adjudged by lord chief justice *Popham*, *et tout le court*, that the action lay, though the lessee had not covenanted for his assigns; for covenants which extend to the support of the thing demised, is *quodammodo* appurtenant to it, and shall run with it; and in regard the lessee had obliged himself to bear the charges of the repairs, the annual rent was certainly the less, which trenched or turned to the benefit of the assignee; *et qui sentit commodum sentire debet et onus*. If one grant to another estovers to repair his house, this is appurtenant to his house. *Fitz. Nat. Brev.* 181. 28 H. 8. 28. If lessee covenant to discharge the lessor *de omnibus oneribus ordinariis et extraordinariis*, and to repair the house, an action lieth against the assignee. 5 Co. 24. a. b.

8. In 42 E. 3. fo. 3. the case was, Grandfather, father and two sons, the grandfather was seised of the manor of *D.* whereof a chapel was parcel. A prior, with consent of his convent, by deed, covenanted for him and his successors with the grandfather and his heirs, that he and his convent should weekly chaunt in his said chapel, for the lord of

the said manor, and his servants, &c. The grandfather infeoffed one in fee, who gave it to the younger son and his wife in tail. It was adjudged tenant in tail, as tertenant, (for the eldest brother was heir) should have covenant against the prior; for the covenant is to do an act which is annexed to the chapel which is within the manor, and so annexed to the manor, as hath been mentioned. *Finchden* said, he had seen a judgment where two coparceners made partition of lands; and one covenanted with the other to acquit of a suit due; and he to whom, &c. aliened, and the suit was in arrear, and the feoffee brought covenant against the parcener to acquit him of the suit, and the writ was maintainable, notwithstanding his being a stranger to the covenant, because that the acquittal ran with the land. [*Co. Lit.* 385. a.] But if such covenant had been to sing divine service in the chapel of another, there the assignee should not have had covenant; for that the covenant, in such case, could not be annexed to the chapel; because the chapel did not belong to the covenantee; as is adjudged in 2 *H. 4.* fo. 6. but there it is agreed, that if the covenant had been with the lord of the manor of *D.* and his heirs, *lords of the manor of D. and inhabitants in it*, the covenant should be annexed to the manor, and there the tertenant should have the action of covenant without privity of blood. *Vide* 29 *E. 3.* 48. and 30 *E. 3.* 14. 5 *Co.* 17. b. 18. a.

9. *Covenant*: whereas by indenture bearing date, &c. between the executor and testator of the defendant, *testatum existit*, that the executor demised such a messuage or tenement with a garden adjoining to the plaintiff's house, to the testator for 21 years; and the testator covenanted for himself, his executors and assigns, that he would not erect any buildings in the said garden, to the prejudice of the plaintiff's lights. The plaintiff alleges that such assignee of the testator, against the said covenant, had erected to such prejudice, &c. for which, &c. the defendant pleads that the lessee assigned to *J. S.* who entered, and paid his rent to the plaintiff, and he accepted such assignee for his tenant; and therefore demanded judgment *si actio*; whereupon it was demurred, and insisted for the defendant, that the privity of contract was determined; the lessor having accepted the rent of the assignee, &c. But all the court conceived, that inasmuch as it is an express covenant, that he shall not build, it shall bind him and his executors, and no assignment or acceptance of the rent by the hands of the assignee shall take from him the advantage of suing him or his executors upon an express covenant, no more than if the lessee had obliged himself by obligation to pay his rent, &c. *Judgment pro quer'*. *Cro. Ca.* 188, 189.

10. *Covenant* against the defendant as assignee of *Dalton*, for that *Dalton* had covenanted for himself, his executors and administrators, to leave 15 acres every year for pasture *absque cultura*, and that he granted to the defendant, and that the defendant *non reliquit* 15 acres *ad pasturam*, but such a day and year ploughed up all. Demurred, because assignee not named, &c. But all the court held, that this covenant is to be performed by the assignee, though not named; because it is for the benefit of the estate, according to the nature of the soil. But to do a collateral covenant, as to build *de novo*, or such like, shall not bind him, unless named; wherefore it was adjudged for the plaintiff. *Cro. Jac.* 125.

11. *Debt*, and declares that he let certain lands to *Agar* for 21 years, rendering annually at the *Temple Church, London*, 30*l.* at *Michaelmas* and the *Annunciation*, &c. *et si contingat*, that the said rent should be behind and not paid at the day, &c. that then the said *Agar*, his executors and assigns should forfeit *nomine poenae* 3*s.* and 4*d.* for every day which should incur after such default, until the said rent and arrears should be paid. That after 28 Feb. 37 *Eliz.* *Agar* granted to the defendant, and that after the grant, Mich. 33 *Eliz.* the rent was in arrear, and not paid for 576 days, and that at another rent-day it was in arrear 12 days; wherefore he had forfeited, &c. whereupon he demanded 300*l.* 16*s.* 8*d.* The defendant pleaded *nil debet*; which was found against him; and it was now moved in arrest of judgment, that an action lay not against the assignee; for this penalty is founded meerly upon the contract, which is in privity between the lessor and lessee, and runs not with the land. But *Gaudy* and *Clench* held that it well lay; for the land is charged therewith, and the assignee, for his own time, shall be chargeable. But *Fenner* held *contra*, for the penalty is *quasi* collateral. And it was also moved, that he was not intitled to the penalty, unless the rent was demanded, no more than he should be to the forfeiture of a lease for non-payment. *Gaudy*: It is not alike; for the condition which goes in defeasance of an estate shall be taken strictly, but the penalty is in nature of the rent, and as he shall have the rent itself without demand, so he shall have the penalty. And to that opinion *Clench* agreed, *Popham absente*; wherefore it was adjourned. *Cro. Eliz.* 383.

12. References, 4 *E.* 3. 3. *Dal.* 4. 47, 83, 101. 10 *E.* 3. 9. 24 *E.* 3. 30. 2 *Inst.* 489, 298. *Co. Lit.* 23, 385. *Cro. Eliz.* 552, 553. *T. Jo.* 144. *Nat. Brev.* 146. *Dy.* 257. *Lit. Bro.* 16. b. *Bel.* 16. b. *Godb.* 70. *The.* 34. *Mo.* 179. *Co. Lit.* 210. a. 215. b. 384. b. 385. a. 5 *Co.* 97. b. *Plow. Com.* 286. *Dy.* 45, 152. *Mo.* 44, 419, 855. 2 *Ro. Ab.* 743, 744. *Leon.* 3. *Lutw.* 1367. 1 *Cro.* 188, 222. 2 *Cro.* 125, 523. 1 *Saund.* 239, 240. *Cro. Ca.* 23, 24, 221, 222. *Lutw.* 369. 1 *Ro. Abr.* 521, 522, 915. 2 *Ro. Abr.* 743. *Hob.* 23. *Poph.* 38. 1 *Ro.* 576. *Dy.* 264. *Yelv.* 222. *Comb.* 185, 186.

13. Rules, *Qui sentit* { *Commodum* } { *onus* } { *sentire debet et* } { *onus*. } *Commodum*.
That shall make satisfaction which received the benefit. That shall have the benefit, which hath or would have sustained the loss. Equality is equity. Equity will do no wrong, &c. Law will not suffer wrong.

481. Trespass none to have, but he who hath actual possession.

What it is, and from whence derived, &c.

1. **T**respass, *transgressio*, derivatur a *transgrediendo*; because it passeth over that which is right.

2. *Transgressio autem est cum modus non servatur, nec mensura: debet enim quilibet in suo facto modum habere et mensuram.* Nota; in the highest and lowest offences, there are no accessaries, but all are principals. As in riots, routs, forcible entries, and other transgressions, *vi et armis*, which are

are the lowest offences. And so in the highest offence, which is *crimen laesae majestatis*, there are no accessaries. But in felony there are accessaries both before and after. *Co Lit.* 57. a. b.

Where and for what it lieth, &c.

General.

3. None shall have trespass, but he who is in the actual possession. *Quod fuit concessum per curiam.* *Hob.* 224.

Particular cases.

4. The lord cannot at his pleasure put out his lawful copyholder, without some cause of forfeiture, and if he do the copyholder may have trespass; for albeit he is *tenens ad voluntatem domini*, yet it is *secundum consuetudinem manerii*. And *Brit.* speaking of these kind of tenants, saith they are privileged, that none of them may be ousted of their tenements, neither may their services be increased, or changed, to make more or other services. And herewith agreeth *Sir Rob. Danby*, chief justice of the court of common pleas, *Mich.* 7 *E.* 4. 19. and *Sir Thomas Brian* his successor, *Mich.* 21 *E.* 4. 80. (*viz.*) That the copyholder, doing his customs and services, if put out by his lord, shall have an action of trespass against him. *Co. Lit.* 60. b. 61. a.

482. *Trust is a creature of equity, and to be governed and disposed by the rules of equity.*

1. LORD chancellor: *Trust is a creature of chancery, and not within the Stat. W. 2. de donis, &c.* and though if tenant in tail of a trust cannot bar the remainder by fine, yet if he make a feoffment, or bargain and sale, he may bar his issue. 2 *Ch. Ca.* 64.

2. *Trust is a creature of equity, and disposable by the rules there.* And on question, where tenant in tail bargained and sold his estate, seeing he had power over it, though there was no fine or recovery, whether equity would decree against the heir? To which lord chancellor answered, he would not supercede fines and recoveries, but where it was a trust and equitable interest, &c. 2 *Vent.* 350.

3. References, *Salk.* 154, 159, 160. *Skin.* 78, 232. 1 *Vern.* 67, 104, 181. 2 *Vern.* 428, 463, 619, 626, 644, 647.

483. *Trust of a term governed by the same rules in equity, as the limitation of a legal estate is at law.*

1. AT law they could not, but by *Stat. 21 H. 8. c. 15.* it was enacted, That a termor might falsify a recovery, as tenant of the freehold might do, by the course of the common law, where he was neither privy nor party to the same; and that notwithstanding any such recovery, he should hold and enjoy his term according to his lease, against the recoverer, his heirs and assigns, &c. 2 *Mod. Ca.* 102, 103.

2. On review to reverse a decree made by the late lord chancellor, several errors were assigned, the principal one insisted on, was, that the limitation of the term over was void. Lord keeper, upon pronouncing the decree, said, when he assisted the chancellor with two more judges, his opinion was against it, and that though he could find no reason to alter his opinion, yet the cause came before him with prejudice, unless they could, by new matter, or new reason convince him: and made a proposal for a trial at law, but the defendant's counsel declined it, and said their title was better here than at law; and insisted much upon the trust of a term different from the limitation of a term. The plaintiff's counsel relied much on the cases, *Child and Bailey*, and *Burges and Burges*. 2 Cro. 456. Pol. 40. The lord keeper saw no reason to alter his opinion, and said on the former hearing, the lord chancellor declared, *That the trust of a term was to be governed by the same rules as the limitation or devise of a term at law was*; and therefore thought the defendant's counsel pressed him unreasonably, who insisted on the equity of the case, and would make a difference between the limitation of a trust of a term, and the limitation or devise of a term itself; said, a perpetuity is a thing odious in law, and destructive to the commonwealth, and therefore not to be countenanced in equity, &c. *If a man settles a term to another and his heirs, it shall go to the executors, &c. and the rule of law must be observed.* Decree reversed. 1 Vern. 163, 164.

3. *Bullock*, for a marriage to be had between *Henry* his son and *Bridget* the daughter of *Knight*, being possessed of a lease of one thousand years, articulated to settle those lands in consideration thereof to the use and in trust for himself 'till the marriage, and after to the use of himself for life, and after his death to *Henry* for life, and then to the use of *Bridget* for her life, and after their deaths, to the use of the issue of their two bodies to be begotten, according to the descent of lands so intailed. The marriage being had, the lease was assigned to those uses, then, the father being dead, *Henry* the husband, granted his interest over and died. *Bridget* survived and died; the defendant administered to *Bridget*. The assignee sued for the benefit of the trust. And the dispute on plea and demurrer was, to which the benefit of the trust belonged? There was no issue living, but the plaintiff made title also as administrator to the issue. Sir *John King* for the plaintiff objected, that the trust of a term limited to a feme covert, was disposable by the husband, and did bind the wife for the trust; *for the trust of a term shall be of the same nature as the term is.* Lord keeper: I should not doubt, if a feme have the trust of a term for years, and marrieth, but to decree it to the alienee of the husband; (*sed quaere* if to the alienee, but it seems it must be to execute the decree to the husband, and then the husband may alien; but the lord keeper said as before) *where a term is settled for the maintenance and jointure of the wife, the husband shall never bind the wife by his alienation.* 2. It was debated, whether the trust limited to the issue were here in nature of a limitation, or by way of purchase, so as the issue born had then an interest vested in him? for the wife's administrator could have no title. It was pressed to be a limitation, not a purchase, the rather for these words, *in course of descent.* Lord keeper: *An use to the husband and wife, and after to their issue, they then having none, is all one as if limited*

mitted to them, and to the heirs of their bodies; and the issue takes nothing as a purchaser. 3. Yet then it was objected by Sir John King, that the husband may alien his part. But (says the reporter) It was not to my intention fully enough pressed, that here the articles were made before the marriage; and consequently they took by divided moieties. The lord keeper ruled the plea good. 1 *Ch. Ca.* 265, 266.

4. 1 *Vern.* 164. 3 *Ch. Ca.* 3, 4, 6, 10, 11, 16, 20, 21, 23, 24. 1 *Ch. Ca.* 8, 287. *Pre. Ch.* 50, 253. 3 *Ch. Ca.* 28, 44, 48. *Gilb.* 238. *Nels.* 258, 341. 2 *Ch. Ca.* 182, 186. *Gilb.* 24, 119, 120.

484. Trustees for a charity may improve for the benefit of the charity, but can do no act to prejudice it.

General.

1. **T**rustees for a charity may improve for the benefit of the charity, but cannot prejudice it. 2 *Vern.* 412.

Particular.

2. If lands or goods are given to one by will, or a remainder limited to one by deed, to perform a charitable use, if the devisee will refuse the legacy, or the grantee waive his remainder by fraud or covin, they are compellable to take the land and to perform the use. *Du. Ch. Uses* 139.

3. And in case of misbehaviour, or misapplication, by the trustees of a charity, chancery will oblige them to assign. 2 *Ju. Eccl.* 177, 178.

485. Trust is either expressed or implied.

General.

1. **E**VERY trust is either expressed or implied.

The difference and what each are.

2. An expressed trust, is when it is either expressed. 1. By parol. 2. Or in writing.

3. An implied trust, is when a man makes a gift without any consideration, or in consideration of nature, or blood only, &c. 3 *Co.* 81. b.

4. Rule, *Equity requires that such gifts as defeat others be made upon as high and good consideration as the things to be defeated by them are of.*

486. *Trust of a term may be limited to divers persons who are in being, one after another; because the same is transferrable: Yet it cannot be good beyond two limitations to a third person not in being.*

1. **A** TERM is limited to husband and wife, and the longest liver of them for life, and after to the eldest issue of them, none being then born; a good limitation: So the limitation to husband and wife, is but one limitation; for though the trust of a term according to the rule in *Goring and Bickerstaff's case*, fo. 4. may be limited to diverse persons that are in being, one after another; because the same is transferrable, yet it cannot be good beyond two limitations to a third person not in being; ergo the limitation to husband and wife, and the longest liver of them, was admitted to be but one limitation. 1 Chan. Ca. 33, 34.

2. References, 1 Chan. Ca. 4, 8, 213, 230, 239.

3. Rule, *Perpetuities odious in law*. Trust of a term governed by the same rules, &c. Trust is a creature of equity, &c.

487. *Trust of a term limited must be in the same manner as the term itself would bear a limitation.*

RULES, *Perpetuities odious, &c.* case 21. Term for years regularly cannot be intailed, though it may be made to wait on an inheritance which is intailed.

488. *Trusts survive.*

1. **L**ANDS are devised to executors to sell, and one of them dies; it is regularly true, that being but a bare authority, the survivor cannot sell. But if a man deviseth his lands to A. for term of life, and that after his decease his lands shall be sold by his executors generally, and maketh three or four executors, and during the life of A. one of the executors dies, and then A. dieth, the other two or three executors may sell, because the land could not be sold before, and the plural number of his executors remain; but if they had been named by their names, as by J. S. J. N. J. D. and G. his executors then, in that case, the survivor could not sell the same; because the words of the testator could not be satisfied; a special verdict was found, that A. was seised of certain lands in fee, and devised the same in tail, and if the donee died without issue, that his said lands should be sold by his sons-in-law; he in truth having five sons-in-law; one of the sons-in-law died in the life of the donee, and after the donee died without issue, and then four of the sons-in-law sold the said land; and adjudged the sale good; because they were named generally his sons-in-law, and the lands could not be sold by them all. And the words of the will, in a benign interpretation, are satisfied in the plural number, tho' they had but a bare authority; but if they had been particularly named it had been otherwise. But if a man devise lands to his executors to be sold,

fold, and maketh two executors, and one dieth, yet the survivor may sell the lands; because the estate to the trust shall survive, &c. *Co. Lit.* 112. b. 113. a.

2. A man seised of divers manors, lands and tenements, in fee of socage tenure, by his last will and testament in writing, devised all the said manors, &c. to his sister and her heirs for ever, (except out of this general grant, my manor of R. which I do appoint to pay my debts,) and makes two executors by name, and dies, and one executor dies also, and the other takes upon him the burthen of the execution of the will, and sells the said manor of R. for 300*l.* for the purpose aforesaid, in fee, and by the opinion of the court he might well so do; for, by reason and circumstances, it was the intention of the testator, and not to leave it to revert to his heir, but to trust his executors with the sale of it, for the speedy payment of his debts. *Dy.* 271. b.

3. Upon a bill *in scac'*, the case was this, The father of the defendant Rowel, gave instructions for his will to be put into writing, that his messuages and lands should be sold by Howe and another, for payment of his debts and legacies, and made other executors, and died without making any other publication of his will. One of the trustees for the sale of the houses and land, died before any sale made, and now the survivor and the heir were compelled to sell; because the lands were tied with a trust which survived in equity. *Hard.* 204.

4. References, *Co. Lit.* 236. a. b. 1 *Chan. Ca.* 177, 178, 179, 180, 211, 262. *Elf. Obs.* 93, 95. *Nel.* 167, 170, 262, 416. 1 *Lev.* 304. *Prec. Chan.* 123, 185. *Barn.* 47, 303, 425.

489. Tithes favoured in law.

Stat. 31 H. 8. *Of Monasteries.*

The alteration it hath made in this doctrine.

1. **T**HE statute of 31 H. 8. *Of Monasteries*, hath made two main changes in the learning of tithes. 1. That it hath, by force of the clause of the discharge, continued certain discharges which were before that statute. 1. By bill. 2. Composition, and 3. Order. And conveyed them over to the king and lay persons, which else would have vanished and dissolved with the spiritual bodies themselves whereto they were annexed. 2. The next is that it hath created and made one new discharge, which was not at common law, *i. e.* The unity of the possession of the parsonage and the lands titheable in one hand. *Hob.* 297, 298. *Vue le liver sur unity of possession.* *Vide etiam Yelv.* 31, 32. *Vide post.* case 4.

General to.

2. The law, *in favorem ecclesiae*, presumes violently that a lay-man cannot be absolutely discharged of tithes; and therefore will not allow a prescription of such discharge; holding it more reasonable that some one man should suffer a mischief to lose such a privilege, being so improbable and of so dangerous consequence, than, for his particular, to admit a spoil of the church, and decay of religion, according to the rule, *Omne magnum exemplum aliquid habet ex iniquo quod publica utilitate compensatur*; so
I though

though you shall be allowed your discharge by grant, when it appears, yet when it appears not, *stabitur præsumptioni*, &c. Hob. 297.

3. Yet a spiritual person may prescribe, for him and his copyhold tenants, *in non decimando*. Yelv. 2. Cro. Eliz. 206, 475, 511.

4. In a prohibition, the suggestion to stay the suit in the spiritual court for tithes was, That the abbot of *Vale Royal* in *Cheshire* was seised of the parsonage of *W.* and of the *Grange of Darnal*, whereof the tithes were demanded by the now parson of *W.* and that the said abbot and his predecessors, time whereof, &c. were seised of the said parsonage of *W.* and of the said *Grange of D.* in their demesne as, &c. in right of their abbey, and *ratione inde* shewed the unity of possession in discharge of tithes upon the said *Stat. 31 H. 8.* To which the defendant pleaded, that the said abbey was founded 5 E. 1. (which is within time of memory) and shews and confesseth the unity of possession of the parsonage and of the *Grange*, after the time of the foundation. And upon the motion of *Coke*, attorney general, (*per totam curiam*) The plea in bar is good, and need not traverse the prescription; for the shewing the foundation of the said abbey to be after the time of memory is a sufficient confessing and avoiding. Yelv. 31, 32.

5. An abbot discharged of tithes *quamdiu in manibus propriis*, made a gift in tail, and 31 H. 8. the abbey was dissolved, the donee shall not be discharged: Yet whenever the land returns, *either before or after the statute*, the king and his patentees, &c. shall hold discharged; for that the land was discharged at the time of the dissolution, *quoad* the abbot. Hob. 302. And by the statute such lands discharged, were given to the crown and its successors and patentees, &c. in such full and ample manner as the same were held by the said abbots and their predecessors, and as the same would have been held by them and their successors, had the said dissolution not been, and had the reverter been to such abbots, &c. So that these discharges are favoured in law, under the statute of Dissolutions, &c. though in the hands of lay persons, as much as if the same had remained, or as any now are discharged in the hands of ecclesiastical persons: And tithes in the hands of lay persons are now a lay fee. Stat. 32 H. 8. Fitzh. Nat. Brev. 49. Cro. Ca. 201. And Fitzherbert in his Nat. Brev. holdeth that long before these days, even before the statute 18 E. 3. cap. 7. right of tithes were determinable in the temporal courts, at the election of the party. 5 Co. De Ju. Regis Eccl. 16. a. And before the council of Lateran there were no parishes nor parish priests to claim them. Hob. 296. Poph. 156. And thus stands the law, the bulwark of liberty, as to the learning of tithes, notwithstanding the dream of champion Ridley, and other advocates on the other side of the question, of a *jure divino* right to tithes; and particularly of turves, timber, minerals, &c. see Ridley's View of the Civil and Ecclesiastical Law, fo. 314, &c. 320, &c. 330, &c. &c. Yet I freely confess, with my lord Coke, that unity within the said act 31 H. 8. ought to have the four qualities mentioned by his lordship in his 11 Rep. fo. 14. Though I must insist, if the unity be rightful, equal, perpetual and free, that though an abbot could not, where his abbey was founded within time of memory, prescribe to be discharged of tithes omnino, as is 11 Co. 15. a. Yet the crown and their patentees, &c. may claim to hold discharged, where the abbot, &c. held so discharged,

though they only so held quamdiu in manibus propriis. And there are many things by our laws, says my lord Hale, in his History of the Law, fo. 32. which are privileged and totally exempted from tithes, though perhaps by the canon law (which is quasi no law to us where we have not received it) are tithable, namely, timber, oar, coals and many more, without a special custom (which custom is common law) subjecting them thereunto; and if the right be founded in custom or common law, then I must refer the jure divino right to the learned civilian above and other advocates of might on his side of the argument, who no doubt of it, were they allowed to be judges, jurors and parties too, would soon root up this learning, together with that of Modus's, and all other disagreeable to them out of our books and records.

* 6. Tithes of a malt-mill is only personal; for it is not a natural increase; being only a profit arising from the invention of a machine and the labour of man and horse; and if only personal, there can only be tithes of the neat profits, deducting all charges; and personal tithes can be only due by custom, and not of common right. See case *Chamberlain and Plimpton*, before the house of lords, 20 Feb. 1706.

Note, That common right is the same as to say at common law.

* 7. Bill was by the rector of S. for tithes of beasts fed upon such a common; the defendant by answer insisted, that the common extended into several parishes, and that the custom was that every farmer should pay tithes to the rector where he lived, and that he lived in another parish, and paid tithes to the rector there; but there being proof, that the cattle were driven upon that part of the common which lieth in S. there was a decree for the rector of S. but reversed by the house of lords; because the custom was good; there being no inclosure. See case before the house of lords, *Michelburgh and Crispe*, Jan. 1710.

* 8. Custom was for the vicar to have all tithes of peas and beans, set, drilled or sowed in rows in garden-like manner, after a new improvement was found out to use the plough instead of the spade, yet such beans and peas shall pay tithes. See case before the house of lords, *Austin and Nichols*, 23 Jan. 1717. Note; These are matters renovant and of yearly increase, &c.

* 9. Lands exempted from, &c. (being inclosed) shall not be made liable to tithes, by the general words of an act of parliament for inclosing. See case *Pratt, Arm', contra, Hopkins*, before the house of lords, 21 May 1730.

* 10. Yet exemptions are not favoured. See case before the house of lords, *Honourable Henry Berckley, Esq; and Fox*, also * *Griffith and Lewis's case*, June 1737.

* 11. References, 2 Co. *Bishop of Winton's case*, 2 Co. 48, 49. Cro. Ca. 393, 403, 404, 423. Hob. 10, 11, 92, 250. Yelv. 86, 87.

* 12. Rule, *Consuetudo semel reprobata non potest amplius induci*.

490. *Vana est potentia quae nunquam venit in actum.*

1. **A** Remainder ought to vest in estate during the particular estate, and ought to take effect in possession when the particular estate endeth; for *Vana est illa potentia quae nunquam venit in actum.* 2 Co. 51. a.

2. Rule, Remainder can depend upon no estate but what beginneth at the same time that the remainder doth.

491. *Ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium, et nunquam decurritur ad extraordinarium ubi valet ordinarium.*

1. **J**OHNS SLADE brought case against *Humphrey Morley*, and declared, that being possessed of a close, &c. for several years, then and yet to come, the plaintiff such a day sowed the same with wheat and rye, which such a day was growing in blades; the defendant such a day, in consideration of the plaintiff's selling the defendant said wheat and rye, (tithes excepted) assumed and promised to pay the plaintiff 16l. at *Midsummer* then coming, and for non-payment was the action; on *non assumpsit* pleaded, and special verdict, against the action divers objections were made by *Dodderidge*, of counsel with the defendant, that the plaintiff might have ordinary remedy, by action of debt, which is a formed action in the register, and therefore he ought not to have case, which is an extraordinary action, and not tied to any certain form in the register; for *ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium*, &c. but it was (*inter al'*) resolved by all the judges of *England*, that the action well lay; and that the plaintiff should have judgment; for though debt lay upon the contract, yet the plaintiff might have debt or case at his election; in respect of the infinite precedents, &c. and also for that every contract executory imports an *assumpsit* in itself; for when one agrees to pay money or to deliver such thing, hereby he assumes and promiseth to pay or deliver it; and therefore when one sells goods to another, and agrees to deliver them at a future day, and the other, in consideration thereof, agrees to pay so much money at such a day: In these cases both parties may have debt or case upon the *assumpsit*; for the mutual executory agreement of both parties imports as well a reciprocal action upon the case as debt; and again, here the party was not only to recover damages for the essential loss, but also for the entire debt, so that the recovery or bar in this action should be a good bar in debt brought upon the same contract. So *vice versa*, a recovery or bar in debt is a good bar in case upon the same *assumpsit*: And in some cases it should be mischievous, if debt only, and not case, should be brought, &c. And case is as well a formed action, and contained in the register, as debt is, &c. and so it was concluded, that in all cases where the register

hath

hath two writs for one and the same case, it is at the election of the party to take which he will, &c. 4 Co. 92. b. *Slade's case.*

2. Reference, *Hard.* 63.

492. *Ubi eadem ratio, ibi idem jus.*

1. *SI deux homes font un trespass a une auter, &c.* here is to be understood when divers do a trespass, the same is joint or several, at the will of him to whom the wrong is done; yet if he release to one of them, all are discharged; because *his own deed shall be taken most strongly against himself*; but otherwise it is in the case of an appeal of death, &c. and if two men are jointly and severally bounden in an obligation, if the obligee release to one of them, both are discharged; and seeing the trespassers are parties and privies in wrong, the one shall not plead a release to the other without shewing it, albeit the deed appertaineth to the other. If an action of debt on an obligation be brought against an heir, he may plead in bar a release made by the obligee to the executor; but albeit the deed belong to another, yet must he shew it forth; for both of them are privy to the testator; *ubi eadem ratio, ibi idem jus.* Co. Lit. 232. a.

2. References, Co. Lit. 191. *Hard.* Duke of York and Sir John Massam's case.

493. *Ubi factum nullum, ibi fortia nulla.*

1. **I**T was resolved *per totam curiam*, That if principal and accessory be, and the principal is pardoned, or hath his clergy, the accessory may not be arraigned; for the maxim is, *ubi factum nullum, ibi fortia nulla; et ubi non est principalis, non potest esse accessorius*; then before it appears that there is a principal, one may not be charged as accessory, and none may be said principal before he is so proved, and adjudged by law, and that ought to be by judgment or verdict or confession, or by outlawry; for it is not enough, that *in rei veritate* there was a principal, unless this appear by judgment in law; and this is the reason, that when the principal is pardoned, or takes his clergy before judgment, that the accessory shall never be arraigned; for it doth not appear, by judgment of law, that he was principal, &c. though the acceptance of the pardon and praying of clergy is an argument, yet there is no judgment of law, that he is guilty; but if the principal, after attainder, be pardoned, or hath his clergy allowed, there the accessory shall be arraigned; and that because it appeareth judicially that the other was principal. 4 Co. 43. b.

2. Rule, *Ubi non est principalis non datur accessorius.*

449. *Ubi non est condendi autoritas, ibi non est parendi necessitas.*

1. **AFTER** the bishop of Rome had arrogated to, and taken upon himself to be spiritual prince or monarch of the whole world, he attempted to give laws to all mankind, as a mark of this his sovereignty; but knowing very well, that *ubi non est condendi autoritas, ibi non est parendi necessitas*, he like the other subtle one, went cunningly to work, and did not at first offer laws to all people, but only caused certain rules to be collected for the government of his own creatures and willing slaves, the clergy only, which he called decreta, and not laws or statutes, but these decrees being received though by the Western church only, for the Eastern church never received any of his rules, canons or decrees, or other like trumpery, then he set about, and not before, drawing also the laity by degrees to obedience to his ordinances, and to this end, he first propounded certain rules or ordinances for abstinence, or fasting days to be observed by the laity as well as the clergy, which on their first appearance and institution, were called by the gentler name of rogationes, rogations, (from whence, it seems, came the weeks of abstinence next before pentecost; to be called rogaion week) and when this usurper, this man of sin in high place, found the laity, of their abundant zeal, received and observed these rogations or ordinances of abstinence, then he proceeded further, and made further rescripts and orders by the name of decretals to bind all the laity of every degree, in matters concerning their civil and temporal estates, which however were not universally received, but only in his own territories; but many of them were totally rejected, nay set at naught, contemned, despised and ridiculed as well as their author, especially in England and France; and though it must be allowed that several ecclesiastical canons have been received and used here, yet it ought to be remembered, and particularly by the men of holy church, that such canons so received and used here, have received their force only from their acceptance and use, and not from any power the pope or church had to impose laws on these realms; for they neither have nor ever had any authoritative force in themselves, but all that ever the church or churchmen did here, more than they had the royal sanction and assent of the people for, were meer incroachments, as far as they were the acts of the bishop of Rome, and they were acts of treason and rebellion; as they were the acts of our own clergy; as all the books antient and modern declare, though the contrary notions have, against all colour, been avowed and practised, to the disinberison of the crown and people, to the disparagement of the common law and our antient constitution itself, by those glaring church lights, St. Anselm, St. Thomas a Beckett, and some other saints of the same order of latter ages; but these holy fathers and their works being mostly defunct, and retired to their deserved oblivion, may they ever rest there.

2. References, *Da. le ca. de commenda. Ha. Hist. Law 27 to 34, 70, 71, 72. 1 Ju. Eccl. 61.*

495. *Ubi non est lex, ibi non est transgressio.*

1. **T**HE purpose or intent of a man, without action, is not punishable by the law; and *ubi non est lex, ibi non est transgressio, quoad mundum.* 4 Co. 16. b.

2. Rules, *Intention, without act, not to be punished. Verba semper accipienda sunt in mitiore sensu.*

496. *Ubi non est principalis, non { potest esse } accessorius.*
datur

1. **J**OHAN GOFFE, brother and heir of *Richard Goffe*, brought an appeal of murder of the said *Richard*, against *Bibitbe* as principal, and against *Hoel David* as accessory before, and against *David ap Thomas* as accessory after. The principal pleaded *non cul'*, but by *nisi prius* in the county of *Monmouth* he was found guilty of manslaughter, and not of murder, and had his clergy. And upon this matter, 1st, It was resolved *per Popham* chief justice, *et per totam curiam*, in the king's bench, that *Hoel David* was discharged; because there could not be an accessory before the fact in the case of manslaughter; for manslaughter ought to follow on sudden quarrel or fray; for if it be premeditate, or of forethought, it is murder. 2dly, It was resolved that though the principal was convicted by verdict, yet as he had his clergy before judgment, so that it did not judicially appear, *scil.* by judgment of law, who was principal, and therefore for the cause alledged in *Syer's* case, [*mentioned before, under Rule Ubi factum nullum, ibi fortia nulla*] it was awarded that both the accessories, as well he before as he after, should be discharged. The same law, if the principal, upon arraignment, had confessed the felony, and before judgment obtained a pardon, or had his clergy allowed him; for there the accessory is discharged. 4 Co. 43. b. 44. a.

2. One *Stephens* and *Alice* his daughter were indicted at the sessions of the peace in the county of *Cambridge*, before the justices of peace there; because the said *Alice* feloniously stole a rake and fork of the value of 3s. and a rope of the value 1s. 6d. and that *Stephens* the father knowing thereof received and comforted the said *Alice*, and so was accessory, and thereupon they were arraigned, and pleaded not guilty: And by means of one *Spicer*, the under sheriff, who returned two of his servants to be of the jury (as appeared by affidavit of some of the jurors) they were found guilty, and *Alice* the principal, because the goods were under value, according to the statute, was awarded to be burnt in the hand, and that she should forfeit all her lands and tenements, goods and chattels: And against the said *Stephens* judgment was given (because he had prayed his book, and was returned *legit ut clericus*) that he should be burnt in the hand; and so it was done immediately to them both; and that he should forfeit all his lands and tenements, goods and chattels; and presently the under sheriff seized the lands and also the goods and chattels of the said *Stephens* being of the value of 500*l.* and returned into the exchequer, that he seized his goods only to the value of 3s. (as it was informed at the bar); and upon this judgment,

judgment, *Stephens* brought a writ of error: And *Grimston* being of counsel with the plaintiff, assigned error in judgment, and *Berkley* and myself being only in court, upon reading of the record, held it to be manifest error; for the principal not being attainted, but discharged by burning in the hand only, according to the statute; the accessory ought to have been discharged without any burning in the hand, and without being put to his book; for he ought not to be condemned but where the principal is attainted, and not where he is only convicted, and had his clergy; and so is the common experience and practice. Also the judgment is erroneously given; because it is, that he shall forfeit his lands and tenements, after such conviction and clergy allowed; wherefore the judgment was reversed: And the clerk of the crown was directed to draw an information upon this misdemeanor of *Spicer*, for the procuring of the said *Stephens* in such an undue manner to be convicted. *Cro. Ca.* 566, 567.

3. References, 2 E. 3. 27. 22 E. 3. *Tit. Coron.* 260. 7 H. 4. 1. and 7. *Fitzb. Coron.* 53. 9 Co. 114. *Lord Sanchar's case.* Stat. 2 E. 6. cap. 24.

4. Rule, *Ubi factum nullum, ibi fortia nulla, &c.*

497. *Verba accipienda sunt cum effectu.*

1. **T**ESTAMENT, *testatio mentis*, is favourably to be expounded according to the meaning of the testator. *In contractibus benigna, in testamentis benignior, in restitutionibus benignissima interpretatio facienda est.* And in wills the latter doth controul the first; for *voluntas testatoris est ambulatoria usque ad mortem*. But though it be the last will that countermands the first, yet the first grant is of the greatest force; and in one will where there are divers devises of one thing, the last devise taketh place, *cum duo inter se repugnantia reperiuntur in testamento, ultimum ratum est.* *Co. Lit.* 112. a. b.

2. References, 39 H. 6. 18. 3 Co. 23. 4 Co. 48. *Co. Lit.* 183. b. *Plow. Com.* 197. b. 213. a. *Cro. Ca.* 293. *Sir W. Jo.* 195. 3 *Cro.* 330, 359, 382, 526, 679, 742. 1 *Sid.* 153, 379. 2 *Sid.* 26, 149, 151. 1 *Lev.* 304. 2 *Lev.* 15. *Plow. Com.* 344. *Dal.* 3. 68. *Salk.* 237. 1 *Show.* 350. 2 *Show.* 63. *Hut.* 32. *Sty.* 301, 307. *Show. Pa. Ca.* 195. *Raym.* 335. *Pol.* 37, 403. *Comb.* 195. 1 *Leon.* 251, 254. 2 *Leon.* 120. 3 *Leon.* 19, 130. 4 *Leon.* 73. *Owen* 35. *Hob.* 65. 2 *Mod.* 9, 292. 1 *Vern.* 250. *Eq. Abr.* 199, 207.

498. *Verba currentis monetae tempus solutionis designant.*

What current money.

1. **R**ESOLVED, though at the time of the contract and obligation made in the principal case, pure money of gold or silver, was current in the place where the payment was assigned, yet mixt money being established before the day of payment, it might be well tendred in discharge of the obligation, and the obligee is bound to accept it: and if he refuse it, and stay 'till the money be again changed, the obligor is not bound to pay him in other money of greater value; it's enough he be always

always ready to pay the mixt money, &c. according to the price it was current at the time of the tender. *Da. 26. b. 27. a.*

Time of payment and place.

2. Future time is intended by the words *current money*; for things past are not current; therefore all have agreed in this rule, *verba currentis monetæ tempus solutionis designant*; and to this purpose, are many cases cited in our books. 6. and 7 E. 6. *Dy. 81. b.* After the fall of money 5 E. 6. debt was brought against the executors of a lessee *pur ans* for two years rent in arrear, ending at *Mich. 2 E. 6.* at which time the shilling, which at the time of the action brought was cried down to 6 d. was current at 12 d. The defendant pleaded tender at the day in *peciiis monetæ Angliæ vocat* shillings, *et que chescun shilling al temps del* tender fuit solubilis pro 12 d. but that the plaintiff, nor any for him, were ready to receive them, &c. and concludes that he is still ready to pay the arrearages in *dictis peciis*, &c. *secundum ratam*, &c. the plaintiff took the money sans costs or damages. And to the same effect is the case of *Pollardes* adjudged 29 E. 1. reported by *Dy. 7 E. 6. fo. 82. b.* in debt on an obligation for 24 l. at two several days. The defendant pleaded, that at the day, &c. *currebat quaedam moneta quæ vocabatur Pollardes loco sterlingi*, &c. and that he the first day of payment had tendred a moiety of the said debt in the said money called *Pollardes*, which the plaintiff refused; and that he is still ready, &c. and offered it in court; which not being denied by the plaintiff, *ideo concessum est*, that he should recover a moiety in *Pollardes*, and the other in pure sterling. *Vide 9 E. 4. 49. a.* A notable case upon the change of money, where it is said that if a man in an action of debt demand 40 l. it shall be understood of money that is current at the time the writ purchased. And there a case of E. 1. is put direct in point. Debt is brought *sur fait* of 30 quarters of barley, price 20 l. It was found for the plaintiff, and the jury were charged to inquire of the price at the time of payment; and it was said that at the time of payment, it was 32 s. per quarter, but at the time the deed made it was but at 30 s. and the plaintiff recovered 18 l. for the corn, according to the price it bore at the time of payment. To this purpose *Linwood* hath a notable gloss upon the constitutions of *Simon Mepham*, lib. 3. de testamentis, cap. item quia. For where the constitution is such, *pro publicatione testamenti pauperis, cujus inventarium bonorum non excedit centum solidos sterlingorum, nihil penitus exigatur*, he makes this gloss, *hic solidus sumitur pro duodecim denariis Anglicanis*, &c. *sed quaero, inquit ille, numquid circa hæc centum solidos debet considerari valor in monetâ jam currente, vel valor sterlingorum qui currebant tempore statuti?* And there he resolveth, *quod ubi dispositio surgit ex statuto, ut hic, licet moneta sit diminuta in valore, tamen debet considerari respectu monetæ novæ currentis, et non respectu antiquæ; nam mutatâ monetâ mutari videtur statutum, ut scilicet intelligatur de nova, et non de veteri.* *Vide register fo. 50. a. and 54. b.* where the king sent his writ to be certified of the value of the church, the words of which writ are, *secundum taxationem decimæ jam currentis.* Anno 31 E. 3. *Fitzb. Anuitie 28.* An annuity was granted to *J. S.* 'till he was promoted by the grantor to a sufficient benefice. *J. S.* brought his writ

writ of annuity against the grantor, who pleaded his tender of a sufficient benefice to the plaintiff, and the issue is there taken upon the value of the benefice at the time of the tender. It was said, that although, in contracts these words, *currentis monetae*, shall refer to the time of payment, yet in last wills they shall refer *ad tempus conditi testamenti*, for the bequest is in the present tense, Item, *I give and bequeath*, &c. therefore legacies shall be paid in such coin as was current at the time the will was made, or according to the rate of it. It was also said, That if a man hath 100*l.* pure silver, in marriage with his wife, and after they are divorced *causa praecontractus*; for which cause the wife shall have her portion back: or if a man recover by erroneous judgment 100*l.* in debt, and hath execution in pure silver, and after the judgment is reversed, so that he shall be restored to all that he had lost, though base money be established in the mean time, yet restitution shall be in such money as was current at the time of the marriage, and at the time of the recovery: but these last cases were not resolved. And as to the circumstances of the place, it was resolved, That though the contract was in *London*, yet *Dublin* being the place appointed for the payment, it is of necessity, that the obligor might make his tender in mixt money, at the time of payment; for all other money was then decried, and this only established; so that had the obligee refused this money, he had committed a contempt for which he might have been punished; also *the judges of the law are not obliged to take notice of any other money than what is current by proclamation*. And therefore *Prisot* said, 34 *H. 6. fo. 12. a.* *Nous ne sommes apprize de 6*l.* Flemish, come sommes de cent nobles*. And therefore in all contracts between merchants, *consuetudo et statuta loci, in quem est destinata solutio, respicienda sunt*. *Budeliu*, de re nummaria, lib. 2. cap. 21. And therefore it was said, upon judgment of debt given in *England*, *sur testatum*, that the defendant *ne ad riens en England*, but that he had goods and lands in *Ireland*, and execution is awarded to the justices or deputy of *Ireland* to levy the debt there, which writ is found in the *Reg. Brev. Judicialium, fo. 43. b.* The sum in such case shall be levied according to the rate of *Irish* money, and not of *English* money, and that in such coin as shall be there current at the time of execution made; and according to this resolution, many other cases upon the same point were afterwards ruled and adjudged in the several courts of record in *Dublin*. *Da. 26. b. 27. a. b. 28. a.*

3. Rules, *Quicquid solvitur solvitur secundum modum solventis. Moneta est justum medium et mensura rerum commutabilium.*

499. *Verba aequivoca et in dubio posita, intelliguntur digniori et potentiori sensu.*

1. *Gregory* brought error against *Blackfield*, and the case was, That *B.* brought a plaint in the court of *Ludlow*, which is a court of record, against *C. tam pro domina regina quam per seipso*, upon the *Stat. 4 & 5 Ph. & Ma. cap. 5.* (which see in *Rast. Draperie 135.*) which prohibits any to weave woollen cloth or kerfies, unless he had been an apprentice, or exercised the trade, &c. for seven years, on the penalty of for-

feiture of such cloth or its value, the penalty to be recovered by action, bill, plaint or information, in any court of record, in which no effoign, protection, &c. and three errors were assigned. 1. That the said branch of the act was abrogated and taken away by Stat. 5 Eliz. cap. 4. *sed non allocatur*; for *inspecto statuto*, both might well stand together, and it was said, that a latter statute in the affirmative did not toll a former act, et eo potius, if the former be particular, and the last general. 2. That by the Stat. 18 Eliz. cap. 5. he ought to have sued either by original or information: And so it was adjudged Hill. 30 Eliz. in this court, where the defendant was sued by bill *sur le stat.* 23 H. 6. de Viscount, and adjudged it lay not. 3. That though Ludlow be a court of record, yet it is not such an one as is intended by the statute for three reasons. 1. The courts intended by the statute *propter excellentiam*, are the four courts of record at Westminster, which are the general courts of record, and therefore in common parlance it shall be so intended; as escuage is either certain or uncertain; the latter is *servitium militare*, the former *servitium socae*, *quia quemadmodum certitudo scutagii facit socagium, ita incertitudo facit servitium militare*. And Littleton saith, if a man speak generally of escuage, it shall be intended (*secundum excellentiam*) in common speech, of the more worthy service, &c. and 10 E. 4. 11. b. if it be spoken of proof generally, though there are several proofs in law, yet it shall be understood of the highest, which is by jury, Perk. 790. and 20 H. 6. 17. if it be general spoken of the feast of St. Michael, if there are two such feasts, it shall be intended of the most worthy and notorious. And 37 H. 6. 29. 21 H. 6. 8. and 13 H. 4. 4. If it be spoke of J. S. generally, it shall be intended of the father, or of the eldest son; for they are the most worthy. And with the case at bar agrees in effect Mich. 6 & 7 Eliz. fo. 236. where any court of the queen of record shall be understood one of the most eminent and excellent courts at Westminster. 2. If the act should be taken according to the letter, *scil.* in any court of record, then courts of Oyer and Terminer, gaol-delivery, sewers, the sheriff's torn, leet, pye-powders, and others, should be within the act; for these and many more are courts of record; then the matter being left to the construction of law, the rule is, *Quod verba aequivoca et in dubio posita, intelliguntur in digniori et potentiori sensu*. 3. The usage in all such popular actions or informations hath been, that though the informer *tam pro domina regina quam pro seipso* exhibited the information, yet if the defendant pleaded a special plea, the queen's attorney should reply only; and it was intended by the makers of the act, that the suit should be in such court where the queen's attorney might attend for the advantage of the queen which she is supposed to take by such suit, and that must be in the four courts of record at Westminster, and for these two last errors the judgment was reversed. 6 Co. 19. b. 20. a.

500. *Verba relata hoc maxime operantur per referentiam, ut in esse videntur.*

AS if the father infeoff the son, to have and to hold to him and his heirs; and the son re-infeoff the father as fully as the father infeoffed him; the father hath a fee-simple, *quia verba relata hoc maxime operantur per referentiam, ut in esse videntur.* Co. Lit. 9. b.

501. *Verba chartarum fortius accipiuntur contra proferentem.*

1. **R**Eferences, 4 H. 7. 7. b. 5 H. 7. 33. 6 Co. 57, &c. 9 Co. 58, 59. Cro. Ca. 510. 1 Ro. 88.

2. Rules, Every man's deed is to be taken most strongly against himself. *Constructio legis non facit injuriam.*

502. *Verba semper accipienda sunt in mitiori sensu.*

In cases of the king himself.

In the king's grants or patents.

1. **T**HE king's grants or charters, made for the erection of pious and charitable uses, shall always be taken in the most benign and beneficial sense. 10 Co. 28. a.

In acts of parliament.

Where the king is bound tho' not named.

2. See rule, *Rex est mixta persona cum sacerdote.*

In actions for words.

Where spoke of private persons.

3. *Action sur le case* for words, Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head, the one part lay on the one shoulder and the other part on the other. Not guilty pleaded; moved in arrest of judgment, words not actionable, not being averred the cook was killed, but *argumentative*; the court of that opinion; for the slander ought to be direct, against which there may not be any intendment; but here, notwithstanding such wording, the party may be yet alive, and it is then but trespass; therefore it was adjudged for the defendant. Cro. Jac. 184.

4. If one woman sue another for calling her *quean*, a prohibition lieth; for that it is not well known what is meant by the word, and it is but a word of heat and anger. Rol. Abr. Prohibition 296. case 14.

5. If a man sue another for calling him *son of a whore*, and his mother was a *bitch*, for which he sueth in the ecclesiastical court, a prohibition lieth;

eth; for they are but words of anger. *Ro. Abr. Prohibition, case 15. see also case 17 and 19. and also 1 Ro. Rep. where spoken of ecclesiastical clerks.*

6. A prohibition was moved for by Mr. serjeant *Wright*, now Mr. justice *Wright*, to the spiritual court of *Norwich*, in a suit pending there for defamation; *you are an old rogue and a thief, and I will prove you so, and an old wotoring rogue, and a bastard-getting old rogue*; he agreed the latter words were of spiritual cognizance; but as the first were temporal, a prohibition lay for the whole, for which purpose he cited, *2 Inst. 493. Rule to shew cause. Easter term following, serjeant Eyre coming to shew cause, argued these words were not of temporal nature sufficient to ground a prohibition; but the court, holding the contrary, made the rule absolute. 2 Ju. Eccl. 215.*

7. If a parson call *A. a drunkard*, whereupon *A. answereth thou liest*, if the parson sue *A.* in the ecclesiastical court for giving him the lye, a prohibition lieth; for that the cause was not spiritual, but depended upon a precedent temporal matter. *Ro. Abr. 295. case 5.*

8. If a man call a minister *knave*, serjeant *Roll* says he may be sued for it in the ecclesiastical court, and no prohibition granted. *Prohibition 295. case 8. tamen quaere de hoc jur 1 Vent. 2. ou une prohibition fuit grant en tiel case.*

9. If *J. B.* say to *J. D.* it is reported *J. N.* did or doth keep in his house a man or boy to bugger, whereto *J. D.* answereth, the vile villain would have done as much to me. If *J. N.* sue *J. D.* averring himself to be a minister, a prohibition lieth; because it is no spiritual defamation, and is felony by statute. *Mich. 8 Car. B. R. Higgon and Coppinger, intratur Hill. 8 Car. Ro. 129. Ro. Abr. Prohibition 2. fo. 297. case 20.*

10. One libels in the court christian against another, for saying of him *thou art fitter for the pillory than for a preacher*, and that he spoke the words in time of divine service; and hereupon sentence is given, that he should recant the words, &c. if the defendant shew to the temporal court, that he spoke them of a certain release, &c. saying that the plaintiff had forged the said release, and that on that account the words were spoken, so that he might have had an action at law for the words, in such case, though the words may maintain a suit in the ecclesiastical court, being spoken in service-time, yet for that sentence is given that he should revoke the words, which is for all, a prohibition shall go for the whole. *Rol. Abr. 316. case 7.*

11. *Prohibition*, because *Parlor*, the plaintiff in the prohibition, was convened before the high commissioners, for saying to *Butler*, a parson, *that he was fitter to stand on the pillory than preach in the pulpit, and that he had taken two orders already, that he wanted but taking the third, which was to have his ears cut off*; *Parlor* justified, because the parson had forged an acquittance, and shewed it in certain; the commissioners would not allow of this justification, but censured him to ask pardon; whereupon he brought prohibition, and well; for the high commissioners had nothing to do with the cause, unless it was in time of divine service. *Mo. fo. 460. case 639.*

12. Dr. *Parsons* libelled against *Coxeter*, for saying of him, *he had no sense, was a dunce, and a blockhead, and he wondered the bishop would lay his hands upon such a fellow, and that he deserved to have his gown pulled*

pulled over his ears; a prohibition was granted; for a parson is not punishable in the spiritual court, for being a knave or a blockhead, more than another man; and whereas it was urged, that a parson might be deprived for want of learning; the chief justice said, if that be the case he may bring his action at law; for that was a temporal damage. So prohibition granted. *Salk. 692. Vide etiam 1 Vent. 2.*

13. A prohibition went to the court christian, to stay a suit there for calling a parson, *fool, ass and goose*, for they are but words of heat, and do not touch him in his profession. *2 Lev. 49.*

14. A clergyman being bailiff of a manor, oppresseth the tenants, whereupon one of them says to him, *you are a knave and fitter to wear a white cloak than a black one*, a prohibition shall go to stay the suit in the court christian. *Rol. Abr. 295. case 6.*

15. The parties being both clergymen, the plaintiff libelled against the defendant in the court christian for saying, *you are an old rogue, and a rascal, and a contemptible fellow, despised and bated by every body*; and likewise for saying of him at another time, *you are a lyer*. Moved by Mr. Filmer for a prohibition; notwithstanding the first set of words were said to be spoken against the plaintiff in his profession or function. Rule to shew cause.

Where spoken by men of a profession in such their profession, and where not, the difference, as judges, counsel, &c.

16. One is accused, before justices of the peace, to be the father of a bastard, and a justice in the examination said, *it is his bastard*, and for so saying, is sued in the court christian; a prohibition shall go; for that the words were spoken in his office. *Ro. Prohibition, fo. 303. case 1.*

17. But *aliter* had the justice spoken them at another time after the examination. *Ibid. Tamen quaere, since it seems to me the matter might be well justified from the proof on the examination, and the order finding him the father, and ordering him to provide for it, as the father of such bastard.* See 2 Ro. Prec. Chan. 87. Cro. Jac. 625.

18. Sir Thomas Hughes of Gray's Inn applied by Henden serjeant, for a prohibition; the case was, he being of counsel with the defendant in case for these words, *the plaintiff hath murdered three children*; on not guilty pleaded, Hughes, to extenuate the damages for his client, pressed the fact to make the matter probable; and because it was in his profession, and pertinent to his client's cause, though it was not directly to the issue, a prohibition was granted. *Hob. 328. Vide 2 Rol. 59, 293. Mo. 915. Godb. 215. Reg. 49, 51. Fi. Ley 142. Dy. 79. 2 Sid. 152. 6 Mod. 26, 287.*

19. In the case of scandal, &c. in a bill or answer, it is now a commendable practice to charge the counsel with costs. *1 Chan. Ca. 71. Margin.*

Where spoken of men of the law.

Judges.

20. Skinner, a merchant of London, said of Manwood, lord chief baron, *that he was a corrupt judge*; and adjudged that the words were actionable.

Vide 4 E. 6. *Action sur le case* 112. 4 Co. 16. a. See also judge *Hutton's* case. See also judge *Croke's* case. *Marsh. Rep. Ca.* 119.

Masters in chancery.

21. The plaintiff *Othelwal* was a master in chancery, and as such a matter was referred to him by the lord keeper, between the defendant *Holman* and one *Gotts*, and the plaintiff made his report, which was decreed; and the defendant being served with the writ of execution of the decree, and the money demanded of him, the defendant being discontented, said he would not pay the money, but prevent it if he could; for that he knew the old course, that the plaintiff and *Gotts* were sharers, thereby falsely and maliciously slandering and charging the plaintiff with corruption, and agreeing to take part of the money; and to the further scandal of the plaintiff, the defendant had preferred a petition to the lord keeper, whereby he falsely charged the plaintiff with divers wrongs and injustices done him in the said report. And for this scandal the defendant was committed to the *Fleet*, fined 1000 marks, and ordered to acknowledge his offence, and make his submission in the court of chancery. *Mich. 3 Car. in the Star-Chamber.* See *Rush. Col.*

22. The plaintiff, Sir *Euble Tbekwal*, being a master in chancery, the defendant being dissatisfied at several reports made by the said master, contrived a libel in nature of a petition, containing that the said master had made a false report in his cause against one *Hughes & al'*, and that he was not an indifferent person in the cause; and to this petition annexed a schedule of exceptions, containing that the said master had made two false reports against him, that he was become his prosecutor by indirect means, &c. and caused the said petition to be delivered to his honour of the rolls, desiring the reference to be transferred. And by another writing delivered to the master himself, he falsely charged him with ordering things not referred, making of false reports in two causes without warrant, cause or colour, and that he was become a party against him; and therefore required him to meddle no further in his business; for which he was committed, fined 200*l.* and ordered to acknowledge his fault at the chancery bar, at the great sessions for the county of *Denbigh*, and the decree to be then read. *Mich. 6 Car. in Star-Chamber.* See *Rush. Col.*

Counsel.

23. Whereas the plaintiff was of the *Middle Temple* for divers years, and called to the bar, and gave counsel to divers the king's subjects, and practiced the law, and had married the daughter of *J. S.* that the defendant having communication with the said *J. S.* concerning the plaintiff and the marriage of his daughter, said of the plaintiff *he is a dunce, and will get little by the law*, to which words the said *J. S.* answering, that others had a better opinion of him, he replied, *he was never but accounted a dunce in the Middle Temple.* Defendant pleaded not guilty, but found against him, and damages to 100 marks, &c. *Cro. Ca.* 382, 383. *Vide* 1 *Rol. Abr.* 55. (5.)

Attornies.

24. Said of a sworn attorney, *he was a corrupt man, and known to deal corruptly*; being before speaking of the manner of his dealing in his profession.

sion. It was resolved, these words, *ex causa dicendi*, import that he dealt corruptly in his profession; and therefore it was said, *quod sermo relatus ad personam intelligi debet de conditione personae*, and the plaintiff had judgment for two reasons. 1. Because it is scandal in his oath. 2. The words scandalize him in the duty of his profession by which he got his living. 4 Co. 16. a.

25. Action for these words of an attorney, *Thou art a knave, and stirrest up suits betwixt parties; and stirrest up suits betwixt such parties to their undoing; and it is great pity such persons should go unbanged.* Adjudged the action lies. Cro. Ca. 229.

Actions de scandalis magnatum, ou de les haut homes del' realm.

The statutes relating to this learning, which are.

26. Stat. W. 1. cap. 33. made 25 April, 3 E. 1. anno domini 1275. 2 R. 2. cap. 5. and 12 R. 2. cap. 9. 1 & 2 Ph. & Ma. 3. and 1 El. 6. both which last are expired.

The purport.

27. By the statute W. 1. a teller of tidings whereof discord or slander may grow between the king and his people, or the great men of the realm, shall be taken and put in prison, till he hath found and brought into the king's court him that shewed him the tale.

28. And by the statute 2 R. 2. cap. 5. tellers of false news and false messengers, [or liers] of prelates, dukes, earls, barons, and other nobles, also of the chancellor, treasurer, clerk of the privy seal, steward of the house, justices of the one bench or of the other, and of other great officers of the realm; &c.

29. And by the statute 12 R. 2. cap. 9. if he cannot find the author, he is to be punished by the advice of the king's counsel.

Who haut home within the intent of the statutes.

30. Viscounts are within the statute of Scandalis Magnatum, though there first creation was not till 18 H. 6. Palm. 565.

31. Also I conceive that peeresses in their own right, are intitled to the benefit of these statutes, and not only so, but also the wives and widows of peers; as the term home takes in and comprehends both sexes, and as I conceive, these are as tender in point of honour, as any of the others expressly named in the same statutes. Tamen quaere.

32. This remedy lies for the barons of the exchequer, though the statute be for the judges of the one bench and the other. Palm. 565.

33. But the king is not included therein. Dy. 155.

How to be construed.

34. These statutes are to be understood of such slanders as touch the nobles, and great officers named therein; and must not be understood of the king; for he is an exempt person, and not implied in these words, *les haut homes, ou grand homes ou nobles.* Dy. 155.

Where-

Wherefore qui tam.

35. As it is said in the statute, that great peril, mischief and destruction might ensue to all the realm, &c. and that it concerned the king, who is head of the realm; for these reasons such actions *de scandalis magnatum* have been brought upon the said statute, *tam pro domino rege quam pro seipso*. 4 Co. 13. a.

Wherefore to be taken notice of, and how by the judges.

36. The statutes of scandal of *les haut homes de l' realm*, are to be taken notice of by the judges *ex officio*, as these statutes concern the king; forasmuch as they are of the prelates, nobles and great officers of his crown, &c. 4 Co. 13. a.

Particular cases.

Of prelates.

37. *Action de scandalis magnatum* brought by the plaintiff, the bishop of Norwich, for these false and scandalous words spoken of him, *You have writ a letter to me, which I have to shew, which is against the word of God, against the queen's authority, and to the maintenance of superstition; and that I will stand to prove against you*: He confessed the words at the trial; to be spoken by him. And damages were found to 500 marks, which were awarded, and 8*l.* for costs. Cro. Eliz. 1, 2.

38. The defendant for publishing a scandalous libel against the plaintiff, (Thornbroughe) being a reverend and learned bishop, was committed to the Fleet, fined 100*l.* and ordered to make an humble acknowledgment and submission to the plaintiff, at Worcester assises, the judges sitting, and the decree to be then and there read. *Bishop of Worcester versus Bowyer, in the Star-Chamber*, Pasch. 5 Car. See Rush. Col.

39. The defendant framed and wrote a witlefs and malicious libellous letter, directed to Mr. Brookes a proctor at York, and Squire, a clerk in the office of consistory there, or to either of them, wherein was contained, *That the bishop is so strong, that if bribery will be taken, you must lie all along, because the bishop sbits warrants at every door*, meaning thereby the bishop of Chester; and sent that letter to them at York, by one Markland, and M. delivered to Leigh who broke it open; and for this the defendant was committed, fined 500*l.* adjudged to stand in the pillory at Wiggan, Lancaster assises, and at Chester, with a paper on his head, inscribed with words declaring the nature of his offence, and in each place publicly and penitentially to acknowledge his offence and scandal of the bishop, in such manner as it should be penned and delivered unto him. *Attorney General versus Reynolds, in the Star-Chamber*, Pasch. 9 Car. See Rush. Col. See also *Scandal spoken of the archbishop of Canterbury, the term of Hil. in the same court and year*, in Rush. Col.

Of temporal, or hereditary peers.

40. Henry lord Cromwel brought an action *de scandalis magnatum* against Edmund Denny, vicar of Northtingham in the county of Norfolk, *tam pro domino rege quam pro seipso*; and declared upon the statute

2 R. 2. cap. 5. That if any should contrive *aliqua falsa nova, horribilia et falsa nuncia, de praelatis, ducibus, comitibus, et aliis proceribus, et magnatibus regni, &c.* whereby debate might arise between the lords and commons, whereby peril, mischief and destruction might ensue to all the realm, &c. *et quicumque contra fecerit* should incur the pains of the statute W. 1. cap. 33. [that he lie in prison till he produce the author] and the defendant was charged that he said to the plaintiff, then a baron of the realm, *It is no marvel that you like not of me; for you like of those that maintain sedition against the queen's proceedings.* The defendant justifies the words; whereupon the plaintiff demurred, and the bar was held insufficient. And term Trin. 23 Eliz. in arrest of judgment it was moved for the defendant, that the declaration was insufficient, the act being misrecited; the words being *si ascun controver: ascun faux nouvelles, et horribles et faux melloignes*, which word (*melloignes*) he, who translated the statutes at large into *English*, had translated (*messages*) which occasioned him, who drew the declaration in the case at bar, to insert the word (*nuncia*) where it should have been *mendacia*. 2. The said act says, *et quicumque le fra incurgera, &c.* the plaintiff in his declaration saith, *et quicumque contra fecerit*, which *tantamounts* to say *que cestuy que ne fra*. But to this it was objected, that the said act was a private act, and concerned only the prelates, nobles, and certain great officers, whereof the court were not, *ex officio*, to take notice; and therefore the court were to take the act as the party had alledged it. But it was resolved by Wray chief justice, Sir Thomas Gaudy, and all the court, *That it was such an act whereof the court should take notice, et eo magis*, because *per un meane* it concerned the king himself. 1. Inasmuch as it concerned the prelates, nobles, and great officers, which are of the king's council, and of eminent quality, and serve him in high and honourable offices which they hold under his majesty; and by his royal authority have the administration of justice to his subjects; by which it appears, *that slander of them principally concerns the king himself in his royal government.* 2. As the statute says, that peril, mischief and destruction might ensue to all the realm, &c. *it concerns the king, for he is head of the realm*: and these are the causes that always such actions, as have been brought upon the statute *de scandalis magnatum*, have been brought *tam pro domino rege quam pro seipso*. And of all statutes which concern the king, the judges are bound to take notice. Also it was resolved, if the act were private, and the court to take it as alledged, then it were against law and reason, and therefore void; for those who had not offended might be punished, which were *condemnare infontem et dimittere reum*; whereupon judgment was given against the plaintiff, *quod nil capiat per billam*. And after the plaintiff brought a new action, and amended the insufficiencies of his count; and then the court was moved, that the said words were not actionable; because it might well be that the plaintiff conceived a liking to some who maintained sedition against the queen's proceedings, and yet not know that they maintained sedition; neither do the words import that he knew they maintained sedition. And it was said, *quod sensus verborum est duplex, scil. mitis et asper, et verba semper accipienda sunt in mitiori sensu*; to which it was said, that *sedition is a public matter; et dicitur seditio quasi seorsum itio magni populi, quando itur ad manus, &c.* That sedition, (being so public and violent) it was said, that by common

intendment the plaintiff had notice of it: It was not to be likened or resembled to felony or murder, which might be clandestine and done in secret. But to this the judges gave no opinion; for they said, that upon argument and consideration, they might alter their present opinions, which might be hurtful to the party; and therefore they told the counsel for the defendant, to be well advised, and to plead or demur at their peril: So they pleaded a special justification, (well knowing that the other matter would be saved to them); and the effect of the justification was, that the defendant was vicar of *N.* which was a benefice with cure, and that the plaintiff procured *J. T.* and *J. G.* to preach severally in the said church of *N.* who in their sermons inveighed against the book of common prayer, established by the queen and parliament, *anno primo* of her reign, and affirmed it to be superstitious and impious, &c. upon which the plaintiff and defendant discoursing in the church of those sermons, the said vicar knowing they had not licences nor were authorised to preach, when they were going and ready to preach, before their several sermons, inhibited them; but they, by encouragement of the plaintiff, proceeded: And the plaintiff said to the defendant, *thou art a false varlet, and I like not of thee*; whereto the vicar said, *it is no marvel that you like not of me, for you like these, (innuendo praedictos J. T. et J. G.) that maintain sedition, (innuendo seditiosam illam doctrinam) against the queen's proceedings, and so justified*: And it was moved by plaintiff's counsel, that the bar was insufficient, for two causes. 1. That the matter of justification was insufficient; because sedition could not be committed by words, but by public and violent action. 2. If the justification were sufficient, then upon the said dialogue between the plaintiff and the defendant, the defendant were not guilty: But it was said that such a justification, dialoguewise, had never been before seen; but if the truth of the case was so, he ought to have pleaded *non culpabilis*, and given the special matter in evidence: But if he will justify, he ought to justify the words in the same sense as they import upon the matter alledged in the declaration: As if a man bring case for calling the plaintiff a murderer, and the defendant will say, that he was talking with the plaintiff of unlawful hunting, and the plaintiff confessed that he killed several hares with a certain engine; whereto the defendant answered and said thou art a murderer, (*innuendo* the killing the said hares) this is no justification; for he does not justify the sense of the words which the count purports; and therefore he ought to plead *non cul.* But as to this it was answered by the defendant's counsel, and resolved by all the court, that the justification was good; *for in case of slander for words, the sense of the words are to be taken*, and the sense appears by the cause and occasion of speaking of them; for *sensus verborum ex causa dicendi accipiendus est. Et sermones semper accipiendi sunt secundum subjectam materiam*; and then in the present case the counsel for the defendant had well done to shew the special matter, by which the sense of this word (*sedition*) appeared, upon the coherence of all the words, that the defendant's intention, was the seditious doctrine against the queen's proceedings on the said act of parliament, *anno primo*, whereby the book of common prayer was established, and that he did not mean any such public or violent sedition as had been described, and as *ex vi termini per se* the word itself imports. And it was said, *God forbid*, that any one's words should

should, by such strict and grammatical construction, be taken by parcels against the manifest intention of the party, upon consideration of all the words which import the true cause and occasion, and which manifest the true sense of them: *quia quae ad unum finem loquuta sunt, non debent ad alium detorqueri*; and therefore in the said case of murder, the court held the justification good, and that the defendant should not be put to the general issue, when he confesses and justifies the words, and, by special matter shews they were not actionable: and though he varies from the plaintiff in the sense and quality of the words, yet *that* can be no cause to drive him to the general issue: as in maintenance, the plaintiff charges the defendant with unlawful maintenance, the defendant may justify by reason of a lawful maintenance, and need not plead the general issue: whereupon the plaintiff replied and said, *quod praedict' Edwardus Denny dixit et propalavit praedicta verba, &c. de injuria sua propria, absque tali causa*; and hereupon issue was joined, *et postea partes concordaverunt.* 4 Co. 12. b. 13. a. b. 14. a. In this case, our very learned author and right reverend judge, advises his readers to take notice of an excellent point of learning, in actions of slander. Namely, 1. His lordship's advice is to observe the occasion, and cause of speaking of the words, and how to plead in excuse of the defendant. 2. When the matter in fact will clearly serve for the client, and you hold that the plaintiff has in law no cause of action, yet take a great care that you hazard not the matter upon demurrer, (in which, upon the pleading and otherwise, perhaps may arise more than you were aware of); but first take advantage of the matter of fact, and leave the matters in law, which always arise upon the matters in fact *ad ultimum*, and never demur in law at first; when after trial of matters in fact, matters in law (as in this case was) shall be saved to you. 4 Co. 14. a.

41. *Scandalum magnatum*, for that the defendant spoke these words, *My lord, (praefat' comit' innuendo) is a base earl, and paultry lord, and keepeth none but rogues and rascals like himself.* Found guilty, and moved in arrest of judgment, that the words were not actionable; for that they touch him not in his life, nor any matter of his loyalty, nor import him in any main point of his dignity; but are only words of spleen concerning his keeping of servants; which is not material. And to that opinion *Yelverton* and *Fleming* seemed to incline; but *Williams* and *Crook* to the contrary; because they touched him in his honour and dignity; and to term him *base lord*, and *paultry earl*, is matter to raise contempt betwixt him and the people, or the king's indignation against him. And such general words, in case of nobility, will maintain an action, although it will not in the case of a common person; wherefore they held that the action lay. *Fleming* absente, adjournatur. Afterwards the defendant died, and thereupon the bill abated. Cro. Ja. 196.

42. The defendant *Pettinger* said of the earl of Kingston the plaintiff, *he is a base lord a t—— in his teeth; he is but a cur, and a base lord, and of no account*; he was committed, fined 200 l. adjudged to pay 2000 l. to the plaintiff, at Nottingham assizes to be publickly whipped, and before enlargement, to find sureties for his good behaviour. *Kingston Comes* versus *Pettinger*, in the Star-Chamber. Mich. 10. Ca. See *Rushw. Coll.* See also *Lord Northumberland's Ca. Hill. 9 Ca. in Rushw. Coll.*

43. General

43. General references, 30 *Aff. pl.* 19. *Kel.* 26. *Cro. Ja.* 18, 90, 625. 1 *Ro.* 217. *Ro. Abr. Prohibition, Ca.* 17, 19. 4 *Co.* 20. 1 *Co.* 111. *Salk.* 207, 552, 692. *Ro. Ab. (N.)* 4, 11, 13. *fo.* 303. *Ca.* 2. *Hob.* 328. 2 *Ro.* 59, 82, 293. *Mo.* 915. *Godb.* 215. *Reg.* 49, 51. *Fi. Ley* 142. 2 *Sid.* 152. 6 *Mod.* 26, 287. *Dy.* 79. 1 *Vent.* 2. *Ro. Ab. Prohibition, Ca.* 6, 7, 20, 22. 2 *Lev.* 45.

44. Rules, *Sensus verborum ex causa dicendi accipiendus est. Sermones semper accipiendi sunt secundum subjectam materiam. Sicut ad quaestionem facti non respondent iudices, ita ad quaestionem juris non respondent juratores.*

503. Verdict at law a bar to equity.

General.

1. **A**FTER a recovery or verdict at law, resolved on demurer, that the party shall not be put to answer. 1 *Vern* 176, 177.

Particular cases.

2. The plaintiff recovered in trespass by verdict, and shewed in the king's bench, that the chancellor had awarded an injunction against him, (and now pending the injunction) he prayed his judgment, and had it, but no damages for his vexation in chancery by the injunction. *Elfm. Obs.* 72, 73.

3. In trespass the defendant was found guilty by verdict, and the plaintiff shewed in *C. B.* that the defendant had sued a *subpoena* in chancery, and obtained an injunction to stay his proceedings at law, by means whereof the plaintiff had spent 10 marks, and now the injunction was dissolved, and the defendant dismissed to common law, where he prayed his costs to be increased, because of this vexation. And *Brian* chief justice awarded, that the plaintiff should recover three pounds for his costs, besides his damages in *C. B.* *Elf. Obs.* 73. *Quaere as to the costs in chancery.*

4. A bill was brought to be relieved against a recovery at law, on an *indebitatus assumpsit* for goods sold and delivered. The bill furnished it was for goods sold the plaintiff as he was master of the buck-hounds, and that the lace and linen were for the king's servants, and that it was the king's and not the plaintiff's debt, and that what he acted was in his office, and not as a private person. And that the defendant was only to expect his money from the king, and that the plaintiff was only to pay it if he received the money from the king. The defendant pleaded his verdict and judgment, and that the plaintiff insisted on the same matter at law, where it was ruled against him, and that his writ of error being near spent, he now brought this bill for delay. And demurred for that the matter was cognizable at law, and the bill contained no equity: yet the court over-ruled the plea, and ordered the defendant to answer the bill. 2 *Vern.* 146.

5. References, 22 *E.* 4. 37. *b.* Damages 138, and judgment 86. 21 *E.* 4. 78. *b.* *Confc.* 22. & *b.* Costs. *Stat.* 4 *H.* 4. *Hard.* 23, 120, &c. 2 *Vern.* 146.

6. Rules, *Equity not to relieve where remedy may be had at law. Has a power upon circumstances, &c. Is part of the law of the land. Is to moderate the rigour of the law. May carry the debt beyond the penalty,*

nalty, &c. Rectifies mistakes, &c. Prevents multiplicity of suits, &c. To relieve where no relief at law. Will redress or prevent wrongs, &c. Relieves against accidents. To relieve against frauds. Where the matter lieth in compensation. To relieve against one's own act, &c.

504. *Vigilantibus et non dormientibus jura subveniunt.*

1. **I**F the king's officers have neglected their duty, as to find an office for him, as was the principal case, &c. it is no reason that the negligence of his officers, nay perhaps their compact and combination with the adverse party, should defeat the king. *Vigilantibus et non dormientibus jura subveniunt*, is a rule for the subject, but *nullum tempus occurrit regi*, is the king's plea. *Hob.* 347.

2. References, 5 *E.* 3. 222. 4 *Co.* 10. *b.*

3. Rule, *Law favours justice and truth*, &c.

505. *Vir militans deo, non implicetur secularibus negotiis.*

General.

1. **B**Y Stat. 21 *H.* 8. c. 13. Spiritual persons are prohibited civil acts. As keeping of tan-houses, brew-houses, &c. save as in the statute, also to traffick in cattle, corn, lead, tin, hides, leather, tallow, fish, wool, wood, or any manner of victual, or merchandize, save as in the said act. Also to farm any manor, lands, tenements, or other hereditaments for life, years, or at will, save as in the said act. Under the penalties in the statute. *Vide* 27 *H.* 8. fo. 21, 22. Also serj. *Ewer's* readings upon the two first branches of this act in *Gray's Inn Hall*, Lent, anno 1637.

2. *Una ecclesia unius rectoris*, as one wife to one husband; that the parson should not farm, graze, &c. nor mingle himself with secular affairs, that might withdraw his mind, &c. *Hob.* 157.

Particular cases.

3. *Scot* brought debt against *Laws*, Clerk, *sur le Statute* 21 *H.* 8. And the writ was *quod reddat nobis et Johanni Scott, qui tam pro nobis quam pro seipso sequitur*, 110 *l.* *quas nobis et praefat' Johanni debet*, &c. And declared, for taking to farm six acres of land, and holding the same six months, *per quod actio*, &c. for 60 *l.* And for holding other lands for five month, *per quod actio*, &c. for 50 *l.* The defendant pleaded, *quod ipse non debet praefato Johanni qui tam*, &c. *praediēt' 110 l. nec aliquam inde denar'*, in *formā qua*, &c. Whereupon issue being joined, the jury found the defendant owed 30 *l.* and for the rest *quod non debet*: *Henden*, in arrest of judgment, took two exceptions. 1. The verdict expressed not for which farm, nor for which of the months, the 30 *l.* was due; but this exception was not regarded by the court; because the demand and issue were for 110 *l.* in general, though it had been more formal to have distinguished it better. 2. That the defendant had not answered the writ and declaration; for the plea ought to have been as the demand is,

quod ipse non debet dicto domino regi et praefato Johanni qui tam, &c. which the court regarded, and the rather, because the statute of Jeofailes excepts penal statutes. *Hob. 327, 328.*

Dr. Ridley, in his View of the Civil and Ecclesiastical Law, speaking of clerks of holy church, and delivering himself from the law of holy church, says, if any such are hunters or hawkers, if they oftentimes use and sport themselves therein; if bishops, they are to be suspended from the communion three months; if ministers or priests, two months only; but if a deacon, he is to be suspended from his office, fo. 114. And according to the same gentleman in the same place, if a clerk oftentimes strikes other men, and being admonished to forbear such kind of violence, does nevertheless continue in his follies he is to be deposed. And our own canons forbid ministers of the church established, being tavern haunters and players at unlawful games, as for that purpose are mentioned in the canons. And our statute laws have denied their exercising themselves in, or mingling themselves with, secular concerns; to the end they might be totally given up and devoted to the service of God and his church.

4. References, 2 Keb. 693. 1 Vent. 105. 1 Lev. 303. Dy. 28. b. 358. a. 1 Vent. 273. Co. Lit. 70. b. Ridley's View, &c. 110, 111, 114, &c. 2 Ju. Eccl. sub tit. Where clerk criminosus, and wherefore one may be deprived.

5. Rule, Clerici non ponantur in officio.

506. Ultima voluntas testatoris est perimplenda secundum veram intentionem suam.

What it is, and when it takes effect.

1. **T**estamentum, id est testatio mentis, which is made nullo praesentis metu periculi, sed cogitatione mortalitatis. Omne testamentum morte consummatum est. Co. Lit. 322. b.

General to.

2. Ultima voluntas testatoris est perimplenda secundum veram intentionem suam; et reipublicae interest suprema hominum testamenta rata haberi, and so it is that a man may have a fee-simple by devise without the word heirs, though not so by deed; and that because the will of the devisor, expressed by his testament, shall be performed according to the intent of the devisor. Co. Lit. 232. b.

3. And the law will manage and marshal the words in a will according to the intent, which here was to preserve contingent estates, in places after the contingencies; for if it so should stand, in construction of law it cannot preserve them; therefore clearly shall be construed before them. 2 Chan. Ca. 11. *Vue le case.*

4. Divers testaments, for voluntas testatoris est ambulatoria usque ad mortem, and the latter will countermands the first. And it is truly said, that the first grant, and the last will, is of the greatest force. Co. Lit. 112. b.

5. Divers devises, &c. is to be understood as well of devises of chattels real or personal, as of freehold and inheritance. Co. Lit. 112. b.

6. Where there are several devises of the same things in the same will, the last taketh place. *Cum duo inter se pignantia reperiuntur in testamento, ultimum ratum est.* Co. Lit. 112. b.

7. *Sed legum servanda fides, suprema voluntas
Quod mandat fierique jubet, parere necesse est.*
Termes de l'Lev, tit. Devise.

8. Devise to be construed according to the intent of the testator. 3 Leon. 55. 2 An. 123, 124.

9. In all cases a court of equity must consider what was the real intent of the testator; and they cannot declare a trust according to their own fancy, nor according to what the testator should have willed; for then they make the will, and not the testator; but they may, according to the real intent of the testator, declare a trust, upon such wills, although it be not contained in the will itself; which is these three cases. 1. In case of fraud upon a legatee. 2. Where the words imply a trust for the relations, as in the case of a specific devise to the executors, and no disposition of the *residuum*. 3. In the case of the legatees promising the testator to stand as a trustee for another. Gilb. 209.

Particular cases.

10. A devise was to the defendant's father, whose son and heir the defendant was, of 20*l.* per annum, out of a rectory, with a clause of distress for non-payment; the glebe belonging to the rectory was but 40*s.* per annum, and the tithe not being subject at law to distress; and so no sufficient remedy at law for the rent; thereupon the plaintiff brought his bill to have the whole rectory liable to the rent; and the defendant was decreed to pay it. On the defendant's part it was insisted, that this court ought not to extend a remedy beyond what the devisor appointed, and the plaintiff must take such remedy as by law he might. To which the plaintiff's counsel replied, that the devisor gave the annuity out of the whole rectory, and intended the tithes as well as the glebe should be liable to it, and that in case of a rent seck, where the grantee had no seisin, this court had frequently given relief, by decree here. But the defendant's counsel insisted, that that was not like this case, because in that case there was no remedy at law at all. Decreed the whole rectory liable, and the defendant to pay arrears and costs. 1 Chan. Ca. 79, 80. Yet observe it is there noted to have been otherwise held since.

11. Foster devised to the plaintiff, Item, I give to my cousin Thomas Martin, clerk, late minister of Houghton in Northamptonshire, and living thereabouts, and order 40*l.* to be paid him, to be disposed of for certain uses, which I shall, in a private note, acquaint him with, and gave him no note or direction how to dispose of it, but died, leaving the defendant his executor; and whether the plaintiff should have the 40*l.* was the question? And his honour of the rolls decreed the plaintiff the 40*l.* for that the testator did not intend it should come to his executors, but had, by his will, given it away from them; therefore ordered the defendant to pay the 40*l.* to the plaintiff. 1 Chan. Ca. 178. See 1 Vern. 255, 462.

12. The

12. The will was begun, and several legacies given to the next of kin, and likewise to the executors, and then at the beginning of the next sentence, the will stopt, and was left unfinished. Lord King: The testator having given legacies to the executors it is most likely he would have given away the residue from them; and therefore decreed the undisposed residue to be distributed according to the statute. *Gilb.* 184.

13. References, *Co. Lit.* 112. *b.* *Termes del Ley*, tit. *Testament*, etiam *Devise*. 1 *Chan. Ca.* 178, 309. 2 *Chan. Ca.* 11, 155. *Poph.* 131, 132. *Nels.* 27, 159, 160, 351, 403, 433. *Gilb.* 11, &c. 118, 119, 133, 136, 209. *Plow. Com.* 523. *a. b.* *Nels.* 312, 313. 1 *Vern.* 37, 38, 470. *Barn.* 14, 160, 253. *Prec. Chan.* 62, 92, 94, 231, 269, 300, 324. *Gilb.* 74, 75, 126. 2 *Vern.* 648. *Prec. Chan.* 566. 2 *Ju. Eccl.* 48. *Case* 6. 50. *Case* 9.

14. Rules, *Equity favours younger children. Is to execute the intent of the parties. In testamentis ratio tacita non debet considerari, sed verba solum spectari debent. Multa possunt movere mentem testatoris, quae nos latent; ideo per divinationem mentis durum est recedere, &c.*

507. Unumquodque eodem modo, quo colligatum est, dissolvitur.

1. **A**N obligation or other matter in writing may not be discharged by parol. 19 *E. 4.* 1. *b.*

2. An annuity by prescription, *rien arrears* is a good plea; for prescription is matter in deed; but in annuity by deed it is not a good plea without shewing an acquittance. 5 *H. 7.* 33.

3. When a man avoids the king's title by as high a matter of record as the king claimeth, he may have it by way of plea, without being put to his petition; though the king be intitled by double matter of record; as where a man is attainted of treason by parliament, and his lands are found on office, whereby the king seiseth; the party may alledge restitution by parliament, and a repeal of the former act. 4 *H. 7.* 7. *b.*

4. In presentable cases resignation may be to the king as supreme ordinary, and is as good, to every purpose, as to the bishop; and that even though the clerk were collated by the bishop or ordinary. *Dy.* 294. 5 *Co. De Ju. Regis Eccl.* 34. *b.* *Palm.* 474. But in the case of an impropriation, resignation must be to the impropriator and not to the ordinary, for he hath nothing to do therewith. *Da.* 20. *Fitzh. Abr. Excommengment* 9. 1 *Mod.* 12, 260, 261. 2 *Mod.* 257. *S. C.* *Hob.* 186. *Cro. Jac.* 517, 518. 1 *Shew.* 252. *Da.* 72, 73. *Skin.* 464, 519. 3 *Mod.* 295. 2 *Ju. Eccl.* 473, 477, 480, &c.

5. All the court held that this, being a donative, began only by the foundation and erection of the donor, and he hath the sole visitation and correction, and the ordinary nothing to do therewith. And as he, *the clerk*, comes in by him, *the donor*, so he, *the clerk*, may restore it to him, *the donor*; for *unumquodque eodem modo, quo colligatum est, dissolvitur*. And though the presentee, when he is in, hath the freehold, yet he may revest it by his resignation, *sans autre ceremonie*. And the ordinary hath nothing

to do therein; for admission and institution are not requisite in case of a donative. *Cro. Jac.* 63. *Yelv.* 60. and *Mo.* 765. *S. C.*

508. *Una persona non potest supplere vicem duarum.*

General.

1. **T**HE statute of *Faculties* is always construed strictly against non-residence and pluralities, as matters strongly hurtful to the service of God, and the instruction of his people. 4 *Co.* 118.

Particular cases.

2. And therefore if a bishop be translated to an archbishoprick, or a baron created an earl, where he hath both dignities; as is commonly said, *quando duo jura concurrunt in una persona, aequum est ac si essent in diversis*; but yet within this act he is but one and the same person to whom the attendance and service shall be done. So if the patron be made a knight of the garter, or warden of the cinque ports, he shall have but three chaplains in all; *et sic de similibus*; *quod fuit concessum*; *quia difficile est ut unus homo vicem duorum sustineat.* 4 *Co.* 118. a.

3. References, 4 *Co.* 46. a. 1 *Ju. Eccl.* tit. *Faculties, the odiousness, &c.* 2 *Ju. Eccl.* *The King and The Bishop of Chester.*

4. Rules, *Quando duo jura concurrunt, &c.* No construction can be too liberal to make parsons reside, &c. *In aequali jure, &c.* *Nemo potest habere duas, &c.* and references under these several rules.

509. *Volenti non fit injuria.*

1. **L**ORD, mesne, and tenant; the king is lord, and the mesne holdeth of him *in capite*, and the tenant of him in socage; if the tenant obtain a release from the mesne, or forejudge him, now he holds *in capite*; for *volenti non fit injuria*; and it should be injurious to the king, if he should lose his tenure *in capite*, by the act of the tenant, and have in lieu of it only a tenure in socage. *Dav.* 67. a.

2. In *ejectione firmæ* between *Thompson* plaintiff and *Trafford* defendant, the case was, *Magdalen College, Oxon.* 20 December 8 *Eliz.* let a messuage in *Southwark*, to which no land appertained, to *Standish* for 20 years, from the feast of *St. Michael* next ensuing, rendring the antient rent, and 25 October 21 *Eliz.* they let the same messuage to the same *Standish* for 20 years, from the feast of *St. Michael* then next ensuing, rendring also the antient rent, and 31 August 30 *Eliz.* the president and scholars made a new lease of the said messuage to *Sir George Carew*, for 20 years from the making, rendring the antient rent, which lease was conveyed by mesne assignments to the plaintiff, upon which the action was brought against the said *Trafford*, who had *Standish's* interest by mesne assignments. *Popham* said, that *ipso facto*, upon the last lease made and accepted by *Standish*, the first lease was determined and gone; for this last contract dissolves the first, when the one and the other cannot stand together, and they cannot here; because they intermix one with the other; and so was the opinion in the common bench about 1 *Eliz.* in the case of the abbey of *Barking*. And here *Standish*, before *Michaelmas* next after the second lease made to

him, could not grant over his first term to be good to the grantee; for if this should be, the second lease should not be good to *Standish*, but for the remnant of the years after the first term finished, which cannot be because it standeth in the power of the grantor, with the assent and acceptance of the grantee, to make the second grant good for the whole term, to wit, from *Michaelmas*; and this cannot be but by a determination in law of the first term immediately, which is made by his own acceptance, and therefore a prejudice to none but himself, *et volenti non fit injuria*, and the first term cannot have its continuance till *Michaelmas*, but is gone presently by the acceptance of the second lease in the whole; for the first contract which was intire cannot be so dissolved in part, but in the whole, as to that which the party hath; and therefore the first term (as the case is here) is gone in the whole, to which *Clench* and *Gaudy* agreed; and if so, then this last lease to *Standish* was but as a lease made to begin at a time to come, which is made good by the statute of 14 *Eliz.* if it do not exceed the time of 40 years from the making of the lease; for the purpose of this act was, that colleges and the like shall not make grants in reversion, tho' for a year; because by such grants in reversion they shall be excluded to have their rent of the particular tenants for the time, &c. *Poph.* 8, 9.

3. If an impropriator present to his church, and his clerk is instituted and inducted, hereby he hath disappropriated it, and made it presentable ever after; for, as *Manwood* said, *volenti non fit injuria*, but it is presentation, with institution and induction, which makes it presentable; for then he is said to come in by the ordinary's means. *Plow. Com.* 501. a.

4. References, 11 H. 6. 18. b. 3. 44 E. 3. 33. b. 44 Aff. 37. *Fitzb. Nat. Brev.* 35. (F.) 1 *Rol. Abr.* 240. 2 *Rol. Abr.* 338. 1 *Darv.* 112.

510. *Voluntas donatoris in charta doni sui manifeste expressa observetur.*

IF lands are given to B. and his heirs, to have and to hold to B. and his heirs, if B. have heirs of his body; and if he die without heirs of his body, that it shall revert to the donor; this is an estate-tail, and the reversion is in the donor; for *voluntas donatoris in charta doni sui manifeste expressa observetur.* *Co. Lit.* 21. a.

511. *Voluntas testatoris ambulatoria est usque ad mortem.*

1. **R**Eferences, *Co. Lit.* 112. a. b. 4 *Co.* 60. *Hob.* 349. 2 *Ju. Eccl.* 35. *Burk and Morgan's case.*

2. Rule, *Ultima voluntas testatoris est perimplenda secundum veram intentionem suam.*

512. *Voluntate et potestate repugnantibus, all is void.*

CRO. Eliz. 719, 720.

513. *Usury odious in law.*

General to, and rules.

1. IF in truth the contract be usurious against the statute, no colour or shadow of words will serve, but the party may shew it, and shall not be concluded or estopped by any deed, or other matter whatsoever; for the statute gives an averment in such case. 5 Co. 69. b.

2. And Popham chief justice said, if A. comes to B. to borrow 100 l. who agrees to lend it, if he will give him for the loan of it for a year 20 l. if the son of A. be then alive; this is usury within the statute; for if such usury should be out of the statute; by reason of the uncertainty of the life, the statute should be of little effect; and for the same reason that he might add one life, he might add more; and so it seemed a mathematical line which *est divisibilis in semper divisibilia*. 5 Co. 69. b. 70. a.

3. Justice Dodderidge took these differences, in case of casual usury. 1. If I lend 100 l. to have 120 l. at the year's end upon a casualty; if the casualty goes to the interest only, and not to the principal, it is usury; for the party is sure to have the principal again, come what will; but if both principal and interest are in hazard, it is not usury. 2. Though I secure both principal and interest, if it be at the will of the party who is to pay it, it is no usury, as if I lend to one 100 l. for two years, to pay for the loan thereof 30 l. and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury; for the party hath his election, and may pay it at the first year's end, and so discharge himself. Cro. Jac. 508, 509.

4. Lord keeper declared it should be the rule, That a mortgagee of a mortgage forfeited, should have interest of his interest, and should be only accountable for what profit he should receive, and not for what he might have received, unless there were fraud. And Note, That it was the rule, That the mortgagee assigning, the assignee should have interest for the interest then due; and never was contradicted but in Porter and Hobart's case, in the time of the lord Shaftsbury. 1 Chan. Ca. 258.

Particular cases.

5. J. S. lent 100 l. for a year and took 5 l. interest at the end of six months, and Popham and Gaudy held it not usury; as not being above 10 l. for 100 l. as if it had been only lent for six months; but Fenner and Yelverton contra, for when 100 l. is lent for a year, the statute intends the profits and increase not to be received till the end of the year, and if 5 l. be received at the end of six months, he to whom the 100 l. is lent, hath but the use of 95 l. for the whole year; and the statute is to be taken strictly against the offender, and largely in punishment of usury: and therefore if 100 l. is lent for a year, and he who lends it takes 10 l. at two days,

days, it is usury. And here when *J. S.* took the 5*l.* it is to be presumed, he would lend that, and take interest of it within the year, which is more than the statute allows; for the most profit of 100*l.* ought to be, *by no means*, more than 10*l. per annum.* And judgment was given by all the judges in *England* against the plaintiff. *Yelv.* 30, 31. *Cro. Ja.* 25. *S. C.*

6. *In debt*, for 120*l.* *Warnes* was indebted to *Alder* in 100*l.* upon an usurious contract; and *Alder* was indebted over to *Ellis* the plaintiff in 100*l.* good debt, for which just debt *Warnes* and *Alder* were bound to the plaintiff. *In debt* upon this obligation, *Warnes* pleaded the usury between him and *Alder*, in order to avoid the bond; *Ellis* the plaintiff replied, that *Alder*, before the bond was indebted to him in 100*l.* just and true debt, for the payment whereof *Warnes* and *Alder* were bound to him in the bond now in suit; and that he had no notice in any sort of the usury between *Warnes* and *Alder*: whereupon *Warnes* demurred; and it was adjudged by *Gaudy*, *Yelverton*, and *Williams*, for the plaintiff; for it is no usury in the plaintiff, and therefore shall not prejudice him; *for though the statute is to be taken strongly for the suppressing usury, yet it ought to be between the parties, who use corruption, and not to punish the innocent*, as the plaintiff here is; for it could be no shift in him, having a due debt precedent; but if no such debt had been due to the plaintiff before, then clearly it had been usury in the plaintiff; there being no lawful cause for giving the bond, but only to countenance the usury between *Warnes* and *Alder*. And *Yelverton* justice said, if this plea should be good for the defendant, every man might be defrauded of his just debt; for commonly the creditor demands surety: and by this case, if the bar should be allowed, then by corruption between the debtor and surety, whereto the creditor is a mere stranger, he might lose his debt, which should be mischievous. *Yelv.* 47. *Cro. Ja.* 33. *S. C.*

7. It was well and wisely said, that God gave riches to supply others needs; and that therefore he is a thief and a murderer, who doth not apply his store to the end God proposed: but alas the covetous man cannot thus employ God's goodness to him; because his heart is set upon his riches, which when he either loseth, or miscarrieth in any his expectations of gain, his heart sickens, sinks, and dies within him: so that had, they bind him; not had, they torture him: these are the miserable circumstances of every one greedy of filthy lucre, which never faileth to take away the very life of the owners, by anxious cares fretting the mind, and emaciating the body, wasting the very bones and marrow, with continual pains and labour after worldly dross; which often, after all his fatigues, to the ruin both of body and mind, take to themselves wings and fly away; and indeed should they stay longer with him, he is still miserable and wretched, being thus enveloped and twisted together with his wealth. Such an one is rather a slave to his hoards than a master of them, even in the midst of his false enjoyments, false both as they are void of all solid satisfaction, even whilst possessed, and uncertain in their stay; he is saddled, bridled, and ridden, by the world and it's emptiness; like the proud horse, he is not only ridden, managed, and taught subjection, but lashed and spur-galled by his rider; he enlargeth his desire as hell, and as death which cannot be satisfied; whereas in the matters of the last and most important consequence

quence to him, his affections are more than moderated; being quite thrust out of door by the impetuosity of the other; whilst on the other hand, the good man, whose confidence is in the fountain of all good, has a treasure laid up sure and permanent, which the malice of neither bad men nor worse beings can dispoil him of; but wretched, bad, and foolish as the avaritious man is, there's another, namely the usurer, still more so; he not only is covetous, and so hath all the anxious cares of mind and fatigues of body with the other, who, perhaps, abating his insatiable thirst after them, is honest in the means of obtaining his gain, and his unrighteousness rests in his immoderate desires, and in his want of a heart to use them as he ought when obtained. Whereas the usurer or extortioner goes into the vilest methods to become rich: he grinds the face of the poor, makes the necessities of the indigent and wretched, which ought to move his compassion, the means of advancing his oppressive ends. He lends, but not to the Lord, gain is his god, and profit his almighty, he liveth upon the sweat of the poor, he drinketh up their blood, and sucketh in greedily their very marrow; he subsists, nay grows corpulent upon the industry and needs and at the cost of those, who, by the laws both of God and nature, have an indefeazable right to his relief without any his cruel considerations, which govern all his actions. This man stands compared to the hare, that at one and the same time litters, gives suck, and is with young. So the usurer's money is bringing forth, nourishing, and breeding profit all at once: nay the usurer may be properly said to make that breed, gender and increase, which by nature is barren and unapt; for the usury money begets and produceth money: whereupon the philosopher said truly, that the usurer maketh something out of nothing: his gain is night and day pursuing its destructive journey, and resteth not even on the Lord's day, so that he's always at work, in defiance of all command, despising what the casuists hold, that usury is a sin against nature, as the usurer hath shut up all bowels of compassion to the wants of his brother, that he neither loveth the author of goodness, whom he hath not seen, nor his brother whom he hath: so far is this man of sin from loving his poor brother for God's sake, or his own, that he has no brother in his own consideration, but hath said, with the fool in the psalmist, there is no God, whilst the good man readily and chearfully alloweth, that usury and extortion are hateful to both God and man: and that the most moderate gain growing from loan, is at best but a *concessum propter durities cordis*.

514. *Utile per inutile non vitiatur.*

1. **A** WIFE, *uxor*, is a good name of purchase; without a christian name: and so it is if a christian name be added and mistaken, as *Eme* for *Emelyn*; for *utile per inutile non vitiatur*. Co. Lit. 3. a.

2. References, Co. Lit. 227. a. Cro. Ca. 48. Hob. 171. Du. Ch. Uses 177.

515. *Ut Poena ad paucos, metus ad omnes perveniat.*

RULE, *Actus non facit reum, nisi mens sit rea.*

516. *Uxor non est sui juris, sed sub potestate viri.*

1. **T**HE wife is *sub potestate viri*, and disabled to contract without his consent, and *omnia, quae sunt uxoris, sunt ipsius viri: non habet uxor potestatem sui, sed vir, &c.* Co. Lit. 112. a.
2. Rule, *Feme covert under obedience of her husband, &c.*

517. *What is done, by way of judgment, in a different manner than the law allows, is against law.*

THE old law is that, which past ages have approved, and that by which justice is to be administred, and *whatsoever is done, by way of judgment, in a different manner than the law allows, is against that law.* Show Parl. Ca. 122.

518. *What one cannot transfer, he cannot compel by articles.*

1. **W**HAT a man cannot transfer, he cannot oblige by articles: and if he cannot grant, he cannot by articles bind. 1 Ch. Ca. 210, 211.
2. He, who may transfer, may covenant, that his trustees shall do it. 1 Ch. Ca. 211, 212.

519. *When a man shall do an act, he must, by the law, at his peril, see that that he doth be lawful.*

RULES, *Ignorantia facti excusat, Ignorantia juris non excusat, Executio juris non habet injuriam.*

520. *When the common and statute law concur, the common law shall be preferred.*

1. **I**T was unanimously agreed by Sir Edmund Anderson, and his companions, justices of the common pleas, That when H. by deed indented bargained and sold to Lyb and his heirs, and before inrolment levied a fine to Lyb and to his heirs, and after the deed is inrolled within the six months, the cognizee shall be in by the fine, and not by the indenture inrolled; for when the fee-simple is passed, by the fine, to the cognizee and his heirs, the inrolment after may not devert it, and turn that estate out of him, which was absolutely established in him by fine; for

for then whereas he was in before in the *per*, he should be now in *in le poss*: also when the common law and statute law concur, the common law shall be preferred. 'Tis true the inrolment shall have relation to the delivery of the deed, but that is for the avoiding of mesne estates, or charges made by the bargainor, to any stranger after delivery of the deed and before inrolment: but not to divest any estate lawfully settled, in the mean time, in the bargainee himself. And the *Stat. 27 H. 8. c. 16.* of inrolments, speaks by bargain and sale only; and here it is not by bargain and sale only, but the estate originally passed by the fine. 4 Co. 71. a.

2. References, Co. Lit. 49. a.

521. Where ever there is *suppressio veri*, or *suggestio falsi*, the release, &c. shall be void.

General.

1. **W**H O is partaker with a thief, hateth his own soul; he heareth cursing, and bewrayeth it not. *Prov. 29. and 24.*
2. The defendant by a trick got a deed into his hands, and burnt or cancelled it. *Per cur'*: Where writings are suppressed, *omnia praeſumuntur*. 1 Ch. Ca. 293.

Particular cases.

Suggestio falsi.

3. He who has right, tells the purchaser the vendor has a good estate, though he knew to the contrary at the time, yet the purchase established. 2 Ch. Ca. 108, 128. *Nels.* 287.
4. A man being seised, in right of his wife, in an inn of 69 *l. per annum*, is drawn in to sell it, having a mortgage upon it before the descent for 80 *l.* My lord *Keeper* was of opinion, that though the purchase was not a fair bargain, yet it was not such fraud as to set it aside. *Pre. Ch.* 206.
5. Three daughters being equally intitled as coheirs, the husband of one fearing to be in law, and being made to believe he should pay costs, released his share to the other sisters, who were to bear the charges of the suit. His share amounted to 1000 *l.* this release was set aside, and *Luxford's* case cited, that a *misapprehension of the party shall avoid his release*. 1 Vern. 32.
6. An assignment of an interest in a lease of the value of 200 *l. per annum*, in consideration of 200 *l.* under false pretences, was set aside, as obtained by fraud. 2 Mod. Ca. 83, 84, 85.

Suppressio veri.

7. Sir *Edward Duke* devised 2000 *l.* to his daughter; but if she should marry one *Bacon*, it should be void. She was married to *Bacon* before her father's death, and she took advice, which was that her legacy was void: her brother paid her 800 *l.* and she released her legacy. A bill was to have this release set aside; suggesting that her brother told her that she was raised out of her father's will: and that he suppressed it, and did not prove it till after

ter the release. Lord chancellor: It is the constant rule, *wherever there is suppressio veri, or suggestio falsi, the release shall be void.* But it appearing, the father himself had revoked this devise, the chancellor decreed against the plaintiff. But where a legacy is upon condition that a woman marry with the consent of J. S. though she marry without, it doth not avoid the legacy; for it is only *in terrorem*; but the father here did what was equitable on his daughter's disobedience. 1 Vern. 19, 20.

8. The landlord of an inn, being the means of cattle being put into the ground belonging to the inn, shall not distrain them for rent. *Prec. Ch.* 7. 2 Vern. 129.

9. A mortgagee having accepted of several bonds for interest, by contrivance with the mortgagor, on the mortgagor's treaty of marriage, tells the woman's father (on his inquiring what was due) of only the principal mortgage money. Redemption decreed on payment thereof only. *Prec. Chan.* 132.

* 10. A. makes an absolute conveyance to B. for 1500*l.* B. executes a defeazance upon payment of 1500*l.* in 16 years. B. upon his marriage settles this, as an absolute estate, upon the wife and issue of that marriage; there being proof that A. made the conveyance to enable B. to get a fortune, though the design was really upon another lady, and not the lady B. actually married; yet decreed A. was bound as *particeps criminis*. See case before the house of lords, *Webber and Farmer*, 21 Jan. 1718. Note; That the wife's father had notice of the defeazance before the settlement made, notwithstanding which, the decree of the court of chancery was affirmed, by eight lords to seven lords; *Cowper and Harcourt* against the decree, and lord Parker for it. * See case *Lord Forbes and Dennistone*, 22 Feb. 1722, and 6 March 1724, and * *Walker and Glascoine*, 6 March 1726, and *White and Leighbourne*, 5 Feb. and 12 Nov. 1722.

11. References, 1 *Chan. Ca.* 293. 2 *Chan. Ca.* 128. 3 *Chan. Ca.* 120. *Nelf.* 287. 1 *Vern.* 453.

12. Rules, *Equity to relieve against fraud. Fraus est celare fraudem. He who hath done iniquity shall not have equity. Qui potest et debet vetare jubet. In odium spoliatoris omnia praesumuntur.*

522. *Wheresoever words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law; the intendment that standeth with law shall be taken.*

1. A. Tenant in fee made a lease of lands to B. *to have and to hold* to B. for term of life, without mentioning for whose life it shall be; it shall be deemed for the term of the life of the lessee; for it shall be taken most strongly against the lessor; and an estate for one's own life is higher than for the life of another. But if tenant in tail make such a lease, it shall be taken for the life of the lessor, for two reasons. 1. *When the construction of any thing is left to the law, the law, which abhorreth injury and wrong, will never so construe it, as it shall work a wrong:* And in this case,

case, of the lease by tenant in tail, if by construction it should be for the life of the lessee, then should the estate-tail be discontinued, and a new reversion gained by wrong: But if it be construed for the life of tenant in tail, then no wrong is wrought. And it is a general rule, *That wheresoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken.* 2. The law more respecteth a lesser estate by right, than a larger estate by wrong; as if a tenant for life in remainder disseise tenant for life, now he hath a fee-simple; but if tenant for life die, now is the wrongful estate in fee, by judgment in law, changed to a rightful estate for life. If a man retain a servant generally, without expressing any time, the law shall construe it to be for one year; for that retainer is according to law. *Vide 23 E. 3. cap. 21, &c. Co. Lit. 42. a. b.*

2. It hath been adjudged, that where tenant in tail made a lease to another for term of life generally, and after released to the lessee and his heirs, albeit between the tenant in tail and him a fee-simple passed; yet after the death of the lessor, the entry of the issue in tail was lawful; which could not be if it had been a lease for the life of the lessor; for then by the release it had been a discontinuance executed. *Co. Lit. 42. a. b.*

3. Rule, *Every man's deed to be taken most strongly against himself. Verba thartarum fortius accipiuntur, &c. Constructio legis non facit injuriam.*

523. Where the foundation faileth all faileth.

A Church is appropriate to a spiritual corporation; now if the corporation be dissolved, the church is disappropriate. *3 E. 3. 74, and 49 E. 3. 8.*

524. Where the law giveth any thing, it also giveth a remedy for the same.

RULES, *Quando lex aliquid alicui concedit, &c. Boni judicis est lites dirimere, &c. Est boni judicis ampliare jurisdictionem.*

525. Where there is no purchaser or creditor in the case, but both parties concerned are volunteers, equity will not hurt or prevent either of them from enjoying the advantage which he hath at law.

1. **R**Eferences, *1 Pe. Will. 45.*

2. Rules, *Aequitas sequitur legem. Alligari non debuit, quod probatum non relevat. Iniquity bars equity. He who hath done iniquity shall not have equity.*

526. Will, the last revokes all former.

General.

1. *WILLS* are ambulatory and always changeable. Hob. 349. And revocations are favoured for the benefit of the heir. 2 *Mod.* 71, 77. Yet the revocation of a will is not to be intended, no more than the disherison of the heir; but must be by express words. *Idem* 73. Yet a will may be revoked by a subsequent one, though such subsequent will be void in itself, it is good as a revocation. 2 *Ju. Eccl.* 82. *Vide postea* ca. 7. 14. 17. Yet privacy in making a will, or loose words to hide the testator's intent, or to keep the family quiet, &c. are not to be regarded, much less to be taken to amount to a revocation. 3 *Chan. Ca.* 81, 82, 87, 88, 117, 127.

2. So a will may be revoked either *pro toto*, as 1 *Vern.* 23. 2 *Vern.* 742. or only *pro tanto*, as 1 *Vern.* 23, 30, 141, 182, 329, 342. 2 *Ju. Eccl.* 83, case 4.

3. And as a will is to be construed as one intire act, though the heir is to be favoured when the case is doubtful; yet if the devisor devise to one and then by the same will devise to another the same estate, this is not to be taken as a revocation, but they are jointenants; which shews that the will is to be construed as one intire clause, and not as different; and by this means contradictions will be avoided in the construction thereof. 2 *Mod. Ca.* 77.

4. The revocation of a will is a matter merely temporal, and discharges the court christian to have any thing to do with it; it is in no sort dependant of the will; for those things are called dependant which go in affirmance, and not what disannuls or disaffirms, as the revocation doth. And though the court christian hath power of the will, and of what is demanded thereby, yet in its original nature, the will itself was temporal. And things which go in abridgment and restraint of the common law, shall be taken strictly, and are not to be favoured in construction. So that the revocation being a thing merely collateral to the will remains at common law, as to the proof, as is 1 *R.* 3. *Yelv.* 92, 93. 9 *Co.* 37, 38.

5. And since the statute of *Frauds*, wills for lands, as they must be made, so they must be revoked, with the solemnities required by that statute. *Vue le Stat.*

6. So before the statute, a man designing to revoke his will, was to do it *in praesenti*; and as one ought to be of good and *sane memorie* at the disposing, so he ought to be of as good and *sane memorie* when he revokes it; and as he ought to make his will by his own directions, and not by questions, so ought he to revoke it of himself, and not by questions. *Cro. Jac.* 497.

* 7. Mr. Attorney General cited a case, where a man had formerly published a will, and afterwards executed another; but the second not being duly executed, and published within the statute of *Frauds*; Lord chancellor Cowper, as Mr. attorney said, but as some others of the bar, lord Macclesfield, set up the former will. Before lord chancellor King, 22 June 1731. *Vide Gilb.* 130, 131.

* 8. He who will claim a benefit by part of a will, must abide by the whole will. At the rolls, 4 July 1737.

Particular cases.

9. If a feme sole make a will, and take husband, this is a countermand, and that for two reasons. 1. The making of a will is but the inception of it, and it takes no effect till the death of the deviser; for *Omne testamentum morte consummatum est. Et voluntas est ambulatoria usque ad extremum vitae exitum.* Then it should be against the nature of a will to be so absolute, that it being made by one of sound mind, may not be countermanded; and therefore this taking of an husband, in the case at bar, being her own proper act, shall amount to a countermand in law. But when a man of sound memory makes his will, and after becomes of *non sane memorie* by the visitation of God, (as almost every one is before his death) God forbid that this act of God should in law amount to a revocation of his will which he made when he was of sound mind. 2. It should be mischievous to women, that after their intermarriage they might not, for no cause whatsoever, countermand their wills. 3. As the law will not allow of any custom that a feme covert might make a devise, for the presumption that the law hath, that it might be made by coercion of the husband, as is adjudged in 3 E. 3. So if it should be in the power of the wife, after marriage, to revoke her will, the law will not suffer it to continue after marriage; because that, by coercion, the husband might cause her against her will, to revoke or continue it. 4 Co. 61. a.

10. *Cooke*, 24 Eliz. devised his lands to his sister in fee; and 12 years after let the same lands by indenture to the same sister for sixty years, to commence after his death, and delivered the deed to a stranger to the use of his sister, but the stranger did not deliver it over, till after the death of the deviser, and the sister never agreed thereto, but claimed by the devise. *Tanfield* argued for the plaintiff, that it was a good countermand, for it is the same person, &c. All the court held, that it was a good revocation of the whole estate; for both those estates cannot stand in her to begin at one time, whereby his intent appeared to be altered, and to give to her a lesser estate. But by all the justices, besides *Walmesley*, if such a lease had been made to a stranger, it had been no revocation for the term. But *Walmesley* held, that in regard it is an intire devise, it is a revocation for all: But the devise of a manor, and after a lease, or a devise of part thereof to another, is no revocation for the residue; for they are several and may be severed; but in the principal case they all agreed, that it is a revocation; for the estates cannot stand together; but if it had been made unto her to begin presently or futurely in his life-time, that had not been any revocation; for it might have determined in his life-time, and have well stood with his will; wherefore it was adjudged for the plaintiff. Cro. Ja. 49.

11. *Ejectione firmæ* upon a special verdict, the case was, That *John Rogers* was seised of this land in fee, holden in socage, and devised by his will in writing to his wife for life; the remainder in fee, &c. And afterwards leased by writing the said lands for two years, to begin after his death, Whether that was a countermand of the will was the question? *Henden* serjeant moved, that it was not any countermand but only for two years; and cited one *Marshall's* case in this court, Mich. 2 Jac. to be adjudged accordingly. But *Hutton* and *Winche*, being only in court, conceived it to be doubtful, in regard the lease is made to take effect at the same time when

when the will takes its effect; but if he had made the lease for years to commence presently, which well might have determined in his life, it had not been a countermand, therefore they required him to search the precedents by him cited, and to shew them in court, and then they would deliver their resolutions *post. Quaere. Adjournatur.* Cro. Jac. 690, 691.

12. Lands are devised to one in fee, and after mortgaged to the same person, this is a revocation *in toto*; but if the mortgage be to a stranger, then it is only a revocation *quoad* the mortgage. *Prec. Chan.* 514.

13. Trespass upon a special verdict, the case was, One by his will devised his lands to J. his youngest son, and his heirs, and afterwards married; and by another will in writing, devised his lands to his wife for life, paying annually to J. his youngest son and his heirs such a rent. *Anderson and Glanville* held this no revocation, but that both may stand, and though they be by several writings, unless it be manifestly contrary to the first will, or that there be an express revocation therein; but they ought to stand together if they may, as made by and in one and the same writing: and here his intention appears, that he had not any purpose to alter it, as to his son, but only to provide for his wife, whom he had espoused after the first will; and by appointing the rent to his son it appears, that his intent was that the reversion should be to his son. *Cro. Eliz.* 721, 722.

14. One makes his will, and thereby deviseth certain lands, and this will is attested by three witnesses according to the statute of *Frauds*; after he makes another will, which revokes all former wills, but the last is not duly executed; the last being no will, and void, will not amount to a revocation of the former. *Prec. Ch.* 459. See 3 *Rep. Ch.* 150, 155. *Gilb.* 18, 136. *Hard.* 374.

15. *Wilkinson* makes his will, and his brother executor, and devised to his executor all his estate real and personal. Four years after he marries, and by a codicil makes his wife executrix. It appeared in proof, that he had no real estate whatsoever. Lord chancellor said, that the personal estate was only intended the brother as executor; and thereupon decreed for the widow executrix. 1 *Vern.* 23.

* 16. A man by will deviseth all his houses in *Mompelier Row* to his wife, and after makes a codicil, and thereby deviseth one of his houses in *Mompelier Row* to his wife; this is not a revocation of the devise by the will; for the codicil doth not vacate the will, as a subsequent will would; therefore it is only a tautology, a giving over again a part of what he had before given her. At the rolls 4 July 1737, before his honour.

17. A devise was of lands to A. and after a devise of the same lands to B. who was a papist; so both devises were void; for though the last is void as a will, yet it is good as a revocation. 2 *Ju. Eccl.* 37.

18. References, *Prec. Chan.* 459. *Hard.* 374, 375. 2 *Vern.* 293, 742. 3 *Rep. Chan.* 155. 1 *Chan. Ca.* 193. 2 *Vern.* 209, 241, 496, 680, 720, 742, 498, 598, 625, 722. *Barn.* 91, 311, 386. *Cro. Car.* 51, 52. 3 *Lev.* 108. 3 *Mod.* 204, 206, 217, 218, 260. *Salk.* 158, 592, 593. 1 *Vern.* 106. 2 *Vern.* 680, 742. *Skin.* 72. *Cro. Jac.* 115, 497, 690, 691. *Orph. Leg.* 254, 255. *Stat. Frauds and Perjuries.* *Prec. Chan.* 32, 33, 183, 354. *Gilb.* 130, 131. 2 *Vern.* 246.

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